Supreme Court of the United States.

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN CAUSE

VICTOR L. BERGER, ADOLPH GERMER, WILLIAM F. KRUSE, IRWIN ST. JOHN AND J. LOUIS ENGDAHL,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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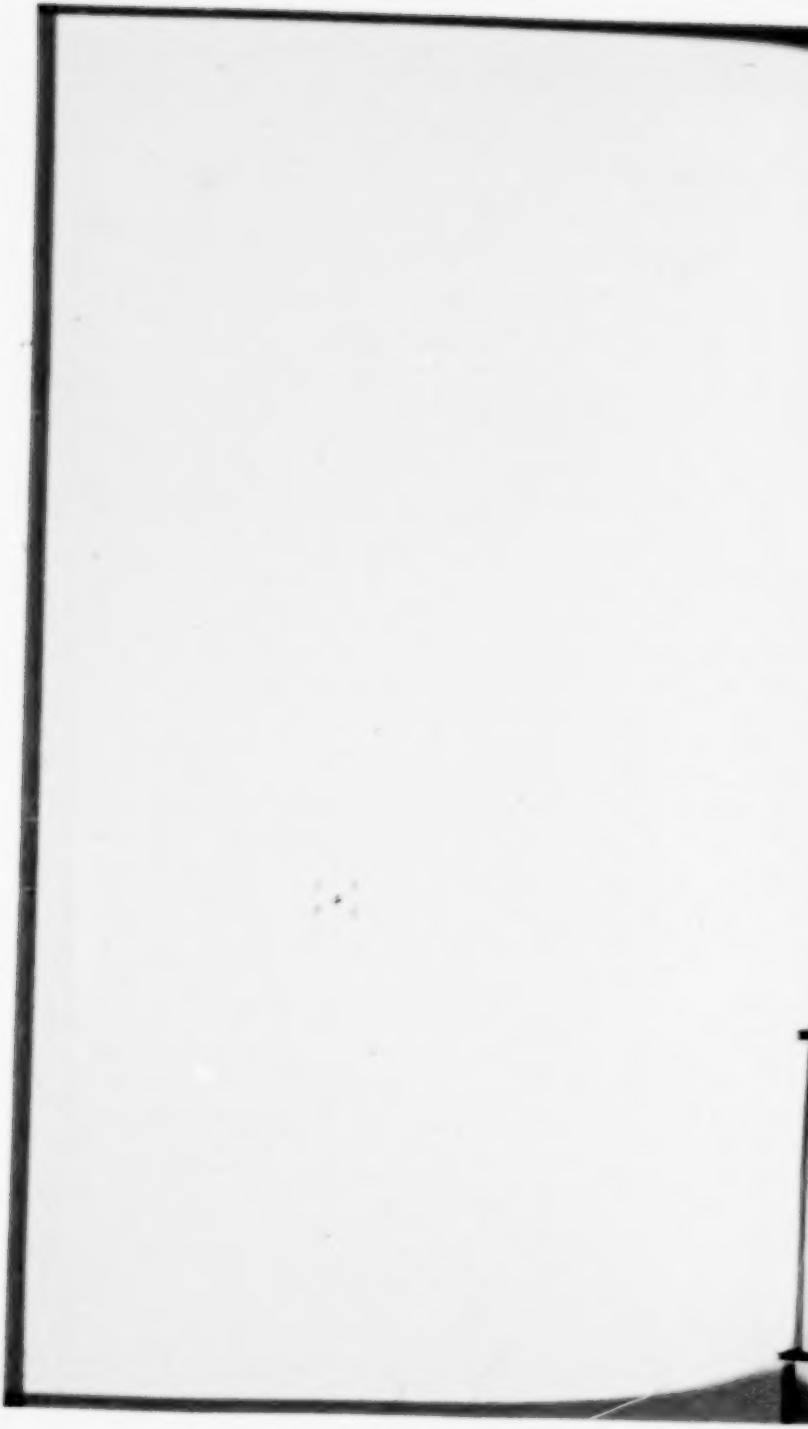

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 2710. OCTOBER TERM, 1919, APRIL SESSION, 1920.

VICTOR L. BERGER, ADOLPH GERMER, WILLIAM F. KRUSE, IRWIN ST. JOHN TUCKER and J. LOUIS ENGDAHL,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

The above entitled cause, having been fully heard and argued in this court before the below subscribing judges thereof, and certain questions of law having in said cause arisen whereon this court is in doubt, and for its proper decision of such questions desires the advice and instruction of the Supreme Court of the United States: It is therefore ordered that the statement and questions below following be certified to the Supreme Court of the United States in pursuance of the Act of Congress in such case made and provided.

STATEMENT.

1. On February 2, 1918, there was returned into the District Court of the United States for the Northern District of Illinois, Eastern Division, an indictment against the above named plaintiffs in error, charging them with the violation of certain sections of the Act of Congress of June 15, 1917, known as the Espionage Act.

2. On October 25, 1918, the Honorable Evan A. Evans, a circuit judge in and for the Seventh Judicial Circuit and then sitting in said District Court, heard and passed upon

certain demurrers and pleas in the said court, and thereupon, on November 12, 1918, there was filed in the said District Court by said plaintiffs in error an affidavit of prejudice of the Honorable Kenesaw M. Landis, one of the two judges of the said District Court, which affidavit is in the words and figures following, to-wit:

"*To the Honorable Judges of the United States District Court of the Northern District of Illinois, Eastern Division:*

Your petitioners, Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, jointly and respectively, respectfully represent that they are defendants in the above entitled cause wherein they are charged with the crime of conspiracy; that His Honor, Judge Kenesaw Mountain Landis, Judge of the United States District Court for said District is presiding over the trial of criminal cases in said court; that the above entitled cause was heretofore presided over by Judge Evan Evans a Judge of the United States Circuit before whom a demurrer in the above entitled cause was presented and argued and before whom a plea of former acquittal was filed by the defendant, Adolph Germer; that said demurrer and plea were ruled upon adverse to these defendants on or about October 26, 1918.

Your petitioners further represent that they presumed that the trial of said cause would probably be presided over by said Judge who heard said motion but that they have been informed within the last week that said cause was on the calendar of and to be presided over by said Judge Kenesaw Mountain Landis unless otherwise provided by the court in accordance with Section 21 of the Judicial Code of the United States.

Your petitioners further represent that they jointly and severally verily believe that His Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause, and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is

of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: 'If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.' And referring to a German who was charged with stating that 'Germany had money and plenty of men and wait and see what she is going to do to the United States,' Judge Landis said in substance: 'One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.'

These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, national Secretary of the Socialist

party; William F. Kruse, editor of the Young Socialists Magazine, a Socialist publication; and J. Louis Engdahl disapproved the entrance of the United States into this war.

Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries, but verily believe because they are impleaded with Berger, Kruse and Germer that they as well as Berger, Germer and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said Berger, Germer and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case.

Wherefore your petitioners pray that proper proceedings be had in accordance with either Section 20 or Section 23 of said Judicial Code of the United States so that the senior Circuit Judge of the seventh circuit in which said Northern District of Illinois, Eastern Division, is located shall assign a district Judge to said circuit other than the said Kenesaw Mountain Landis to preside at the trial of the above entitled cause.

VICTOR L. BERGER
ADOLPH GERMER
J. LOUIS ENGDAHL
IRWIN ST. JOHN TUCKER
WILLIAM F. KRUSE.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK }

Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, being first severally and jointly sworn on oath say that they are respectively the persons whose names are subscribed to the foregoing petition for designation of a different judge for the trial of the above entitled cause because of the prejudice of the presiding judge; that they are each respectively familiar with the contents of said petition, and that the matters and things therein contained are true in substance and in fact, except such matters and things as are set forth on information and belief and

as to such matters and things said affiants believe them to be true.

VICTOR L. BERGER
ADOLPH GERMER
J. LOUIS ENGDAHL
IRWIN ST. JOHN TUCKER
WILLIAM F. KRUSE.

Subscribed and sworn to before me this 8th day of November, A. D. 1918.

IDA T. MAHNKE,
Notary Public.

I Seymour Stedman, attorney for Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, defendants in the above entitled cause, do hereby certify that I have prepared the foregoing petition for change of venue and said petition and application for change of venue is made in good faith.

SEYMOUR STEDMAN,
Attorney for Defendants."

3. It appears from the record of proceedings in said District Court that after the filing of said affidavit of prejudice and on to-wit November 16, 1918, the following proceedings thereon were thereupon had in the said court before Honorable Kenesaw M. Landis as judge thereof, viz:

"The Court: (To defendants Berger, Germer, Engdahl, Tucker and Kruse). You have filed a petition here—at all events a petition has been filed here purporting to bear the signature of you five men, subscribed before a notary public on the 8th day of November, 1918: Do you know what I am talking about?

To which question all of the defendants replied 'Yes.'

The Court: Who informed you, Mr. Berger, that this Court, meaning this particular occupant of the bench, used this language:

> 'One must have a very judicial mind indeed not to be prejudiced against the German Americans in this country; their hearts are reeking with disloyalty; this defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all of the Germans in this country; the same kind of an excuse of the defendant offering to protect the German people is the same kind of an excuse offered by pacifists in this country

who are against the United States and have the interest of the enemy at heart by defending that thing that they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country to get away from the Kaiser and the war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same kind that practically all of the German-Americans are in this country. You call yourselves "German-Americans"; your hearts are reeking with disloyalty.'

Where did you get that?

Mr. Stedman (representing plaintiffs in error): I want to object to the examination of petitioners as witnesses on the trial of any issue raised on this petition.

The Court. Is this objection raised at the request of the defendant?

Mr. Stedman: I am representing these persons.

The Court: Your objection is overruled.

Mr. Stedman: Exception.

Mr. Berger: Judge, I am to be guided by my attorney.

The Court: I do not want you to go into anything that may be involved in the case—all I am asking is this: I assume that you are a man who is interested in the truth. Am I right in that assumption?

Mr. Berger: Yes sir.

The Court: Now, you heard my inquiry: Who told you that I said this? You heard my question.

Mr. Berger: Yes.

The Court: And you heard Mr. Stedman object to that question. Does he object to that question in your behalf, at your request?

Mr. Berger: He is my attorney and I have no right to interfere with his way of conducting this case.

The Court: Is that the answer of each of the defendants?

(To which each of the defendants replied, 'Yes.')

The Court further inquired of the defendants if they understood that all his question asked for was the source of their authority for the assertion that he had used the language quoted in the petition, and the defendants stat-

ed that they so understood it, and that they availed themselves of the objection made by counsel.

The Court then inquired of Mr. Cochem, Attorney representing Defendant Berger, whether he had made any effort to ascertain the accuracy of the statement alleged to have been made by the Court. Cochem relied that he had not.

The Court: Is there anything you want to say in support of this motion?

Mr. Stedman: Nothing at all.

The Court: The motion is denied.

The Court: I am asking you if the member of the bar, Mr. Johnson, now standing by your side, and who, you informed me the other day was your authority for these facts, does he swear that I made use of that language?

Mr. Stedman: His affidavit is not there, but he does make that statement.

The Court: Does he swear in this proceeding?

Mr. Stedman: No.

The Court: Now further, let me inquire, that language which this affidavit attributes to me in the manner disclosed by the affidavit, as I understood you to say the other day, is claimed by Mr. Johnson, the gentleman I have referred to, to have been used by me in connection with the disposition of the case of the United States against Weissensel?

Mr. Johnson: That is correct.

The Court: After the verdict, and upon the occasions of the imposition of the sentence?

Mr. Stedman: Yes.

The Court: Mr. Johnson, do you now desire to be sworn to give me your evidence as to this statement for the court to use on passing on the motion for change of venue?

Mr. Johnson: No sir.

The Court: You are a member of this bar?

Mr. Johnson: I am.

The Court: The motion for the order asked is denied.

Mr. Clyne: Does Mr. Johnson appear as one of the counsel?

Mr. Johnson: Yes I am one of the counsel.

Mr. Clyne: If your Honor please, we have a stenographic report, if your Honor cares to put it into the

record, of what was said on that particular occasion, and we have the reporter here who reported and transcribed it.

The Court: You may file it; not that it is of any interest—

Mr. Johnson: Your Honor, I want to make a statement—

The Court: Anything you desire to say about the facts will have to be made under oath.

Mr. Johnson: I want to make my objection—

The Court: Just a moment. This court, in dealing with a situation of this kind will have to, as it must be obvious, will have to adopt such rules and procedure as will tend to discourage the use of the change of venue processes authorized by the statutes of the United States as a mere vehicle for the conveyance of slander and libel. Now, anything you want to say about this you will have to present here under oath, in view of your attitude, sir.

Mr. Stedman: I want an objection and exception to the introduction in this case, I understand,—I have not seen it, but there was some purported report offered in evidence by the District Attorney and I want—I understand it was filed, and I want to object to it.

The Court: Object to it being filed?

Mr. Stedman: I object to it being introduced in evidence. Now, do you understand that was introduced in evidence by simply filing it?

The Court: The only interest I could have in that,—my understanding is, that that is probably not admissible; probably incompetent,—in other words, as I understand the general rule, it is at least seriously questionable whether a fact that is averred,—the thing averred as a fact is controverted—

The Court: I will let it go in on this theory: having read that petition, I think that the judge against whom that averment is made, if the averment is not in fact true, if the report upon which the averment was made is in fact untrue, it goes to his own court; the truth should be shown of record in connection with the falsity. Maybe I am powerless in that, I do not know, but this affiant swears that he has been told that I said that the hearts of all German-Americans were reeking with disloyalty. I will let it be filed.

Mr. Stedman: And we take an exception to that.

Be it further remembered that thereafter said motion for a change of venue coming on to be heard on said petition, and the court having heard the arguments of counsel and being fully advised in the premises, the court then and there overruled and denied said petition.

To which ruling of the court the said defendants by their respective counsel, then and there in open court, duly excepted.

Subsequently there was filed herein said stenographic report, same being in words and figures as follows, to-wit:

CITY OF CHICAGO, }
STATE OF ILLINOIS. } ss.

HUGH P. LUTZ, being first duly sworn on oath, deposes and says, that he has been a stenographer and shorthand reporter for over twenty-five years; that for the past five years he has been connected with the United States Attorney's Office, at Chicago, Illinois, as Clerk to the United States Attorney and Assistant United States Attorney; that on Friday morning, November 1, 1918, he was present in the United States District Court, presided over by the Hon. Judge K. M. Landis, for the purpose of taking shorthand notes of the evidence, statements and proceedings in the case of the United States *vs.* August Weissensel, D. C. No. 6390, that this case was called by the Clerk of the Court, for disposition on verdict, that he took such shorthand notes, which said shorthand notes are a true and correct report of statements then and there made and of proceedings that then and there took place, and that the attached seven typewritten sheets contain a true and correct transcript of said shorthand notes.

And further affiant sayeth not.

HUGH P. LUTZ.

Subscribed and sworn to before me this 16th day of November, A. D. 1918.

WILLIAM A. SMALL,
Notary Public.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois

Eastern Division.

United States of America
vs.
August Weissensel
} D. C. No. 6390.

Before the Hon. Judge K. M. Landis, Friday, November 1, 1918.

Motion for new trial and in arrest of judgment heard and overruled, and exception. Sentenced to 10 years in the United States Penitentiary at Leavenworth, Kansas, and committed.

The Clerk: 6390. United States *vs.* August Weissensel, for disposition on verdict.

Mr. Johnson: Motion for new trial in that case. At the time the verdict was entered, I talked to the defendant, and he told me at the time, the court advised him,—asked whether or not he wanted counsel; he thought he had to pay for it, therefore, he said that he did not make any request, and was surprised—

The Court: Were you here when I first brought up the subject? He did not tell you the truth,—that is just in line with everything that has been told to you by this defendant. I ordered you into the case—

Mr. Johnson: I never had an opportunity to talk to the defendant,—I simply want to complete my obligation to the court. I feel that there was some matter that came in before the jury, that was irrelevant and prejudicial to the defendant.

The Court: What was it?

Mr. Johnson: Afterwards brought out by the questions of counsel. Mr. Borrelli, after I had asked him question whether he had been arrested, Mr. Borrelli said; you were arrested for wife beating and for drunkenness, and not supporting your wife—

The Court: You asked the man if he had ever been arrested before.

Mr. Johnson: Here is a man sixty some odd years of age, head of a family of six children, living with his family at the time, and he had never been convicted of crime.

The Court: You didn't ask him if he had ever been convicted of any crime.

Mr. Johnson: I asked him if he had ever been arrested,—it turned out afterwards he had been convicted and sent to the House of Correction. He tells me for refusing to give her any money. That happened over a year ago. He was arrested and sent down two or three years ago. He gave the jury a very bad impression.

The Court: I haven't the slightest doubt about it. You said: were you ever arrested?

Mr. Johnson: I know I did.

The question: Now, was the question of your adversary on cross-examination improper?

Mr. Johnson: He said; you were sent down there for wife beating, weren't you? His answer was, No, and then he told why.

The Court: Just for holding her supplies away from her. That had nothing to do with this.

Mr. Johnson: One of the jurymen called my attention to it, after the case had been disposed of. I know he was very instrumental in it, and I went into it, and furthermore counsel put his own son on the stand to testify, and he didn't ask him question, did your father ever argue anything against the United States, he asked him the question; isn't it a fact that your Father always took the side of Germany against the United States, calling for a conclusion.

The Court: I sat here when this thing happened, and that did not happen. Did a juror tell you that?

Mr. Johnson: Not as to that, he did as to the other matters.

The Court: Well, if a member of that jury told you that the jury would have acquitted this man, if it had not been for its coming out that this man had ill treated his wife, why that juror must have been cracked in his head. Now, I doubt whether any juror expressed even an individual jurors opinion, if he used any words to that effect.

Mr. Johnson: Furthermore Polish witnesses that took the stand, their motive was very apparent.

The Court: The jury saw whatever the motive was. They had the motive. They were trying to enlist soldiers to go over there to fight these people,—not strange that the Polish should do that in 1918, and this man

comes in there and proceeds to shoot off his mouth,—naturally they didn't like it. The strange thing about it to me is, that he went out of the barber shop on his feet instead of on his head, and had the witness been able to carry out what they intended to do, but the man was in the barber chair and these people were taking turn and they were saying something against the Kaiser and the German people, and he took protest because it was against the German people. If they have said anything worse against him that I have said, I would like to know what it is.

Mr. Johnson: I am simply pointing out it was—

The Court: A man in this country now, in 1918, that has such a judicial mind that he can express affection for this thing called the Kaiser, and his darling people, he is a little bit too judicial minded for his safety in this country.

Mr. Johnson: He did not—

The Court: This man did not? He fought his own son, in his own household, month after month, when he had another son in the United States Army.

Mr. Johnson: Yes, and he advised him—

The Court: Have you anything to say in support of your motion for a new trial?

Mr. Johnson: No.

The Court: Overruled, motion in arrest for the same reason and any other reason appearing on the record, overruled and exception. Anything further? Have you anything to say Weissensel before this case is disposed of?

(A) This talk in the barber shop was more heated against the German people than anything else, I believe, and God in heaven made the angels first, and—

The Court: God did what?

(A) Made the angels first before they made Adam and Eve; they are doing things against each other, one nation against each other, and one nation against each other, what should not be, and innocent man for just talking a few words.

The Court: God has been charged with a heap of things in the last few years—

(A) I believe in God in this thing, I had no bad mind, I had nothing against the United States, I always was a good citizen, I took my papers out in time, 1894.

The Court: What do you mean by being a good citizen?

(A) Always did my duty.

The Court: Do you call it being a good citizen when your country is at war, to stand up and advocate the cause of the country with which your country is at war, in the presence of your own son, do you call that being a good citizen? Do you call having an argument with your own son being a good citizen?

(A) It was when reading paper,—he read one paper and I read one paper, that is all, making big thing out of a little thing.

The Court: You were spending all the energy you had to spend against the fellows from your neighborhood that were over there fighting for you. That is what you were doing.

(A) I was glad to see him in the uniform. I says, go ahead and obey your officer, and be good, do what your mother told you when you was young, what you learned from Sisters and Priest, and never disobey your officer and I will be proud of you. I bid him good-by at Union Station when I saw regiment, he belonged to the 7th Regiment since he was 18 years old. Now he is 27, and I would like to see him back again.

The Court: I haven't the slightest doubt you would like to see him back,—I can understand that.

(A) And I have another two sons, they be private now too, they over 18 and the other is near 20.

The Court: The case of this man is a case charging violation of the Espionage Act. The charges in the indictment, which is in three counts, are that at various times and places the defendant used this language during this last summer, in the city of Chicago: You will see what Germany will do to the United States; they have got the money; they have got the men. On another occasion: Stop that talk, because I am a German; the Kaiser will soon be in New York and you will see what he will do to the United States. And on another occasion: The Germans will go right through the United States, in which connection the charge is that this defendant used other language to illustrate how the Germans will go through, he used a well known simile a part of which simile has to do with the celebrated tin

horn,—how Germany would go through the United States.

(A) I did not say that.

The Court: I say, you deny it.

(A) Your honor, I never said that.

Mr. Johnson: The man testified that he had not seen the defendant for two weeks, that he had worked with him continuously for two weeks, that during all that time they talked together, and he never heard the defendant say a thing about the war, that he was discharged, and the fact was he was discharged—

The Court: All of this is small stuff compared to the admitted stuff that finally came out on rebuttal,—that in his own home he was preaching this stuff, day after day, to his own son, with another son in the army. This is petty compared with what came out from that witness. I do not have any grave doubt that being matter of—in trial of the case to bring it out; that would have been proper on the main case on the proposition as going to the question of intent. Now this is the kind of thing that has been going on here for months. This man is the type of man that has been more efficient, to use the term that his native countrymen love,—efficient in his operations, than any other class of offenders we have got. It is just this type of man that has branded almost the whole German-American population. One German-American like this fellow, going about talking this stuff, does more damage to his people, and by his people I man, born in Germany and after they come here, than thousands of these people can overcome by being good and loyal citizens over here. That is his real offense,—it is a case of a man who came here 40 years ago and more probably kicked out of Germany, or crawled out, or dodged—

(A) I—

The Court: Did you want to serve in the army over there? Well, ducked out.

(A) I left the old country, I have my papers, all passes—

The Court: Now this type of man came here, then the time came when this fight came on. This fellow wouldn't even stay there and go through with the army, he didn't love it enough to do that, but he had such an affection for it that he ducked away and got across the sea to this

country solely to miss that thing,—that was the depth of his affection at a time when affection for that thing over there meant something, he came over here, lived here all these years, then the time came when that thing was fighting for its life, and when we were fighting for our lives, and the only expression that this man had in his heart respecting that controversy was of affection for that thing back there. I say he is an ideal illustration of the occasional American of German birth whose conduct has done so much to damn the whole ten million in America. Now I am telling him and you too when I say that; he had a son in the army, a volunteer in the army for the United States; he had another son in his own home coming of age to be a volunteer, and under those conditions this man, day after day, and day after day, went to the mat with that boy, advocating the cause of Germany to that boy.

The Court: Give me the statute: Good citizen,—he would have been a better citizen if he had been burglarious all the forty years in America, if he had stood up now, because I know personally of some burglars, I have a personal knowledge of a safeblower, a man I have known for 9 years personally. He is a good soldier, he has done fine. In time of peace he was that kind of a man. I know that man. He is a friend of mine. As between that safeblower by profession, now a soldier in France, and a man like this man who never blew a safe or picked a pocket, but who at this time has done what this man has done, I vote for the safeblower. He is the better citizen of the two. So far as his argument about the newspapers is concerned, it shows a heart reeking with disloyalty. He takes issue with certain statements made in the newspapers. Under this espionage act,—what is the age of this man?

(A) 53, 21st of June.

On account of that son that is in the army, I am going to give him a credit of 50%,—that son is in the army, that he did not support; that son that is in the army, to whose burden this Father added consciously and deliberately, in consideration of that son, this will be half of what it would be if it were not for that son in the army. 10 years at Leavenworth. Exception to the judgment prayed, allowed 60 days for bill of exceptions.

The Court: Call your next."

No further proceedings appear of record respecting said affidavit of prejudice.

4. Thereupon the said cause proceeded to trial before said Judge Landis. The jury found plaintiffs in error guilty, and they were each sentenced by said Judge Landis to twenty years imprisonment.

QUESTIONS.

1. Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the Act which provides for the filing of affidavit of prejudice of a judge?

2. Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

3. Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

FRANCIS E. BAKER,
SAMUEL ALSCHULER,
GEORGE T. PAGE,
Judges United States Circuit Court of Appeals, Seventh Circuit.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from one to sixteen, inclusive, contain a true copy of the questions certified to the Supreme Court of United States pursuant to an order of this Court entered on June 24, 1920, in the case of Victor L. Berger, Adolph Germer, William F. Kruse, Irwin St. John and Louis Engdahl vs. United States of America No. 2710, October Term, 1919, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of June, A. D. 1920.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 27,817. U. S. Circuit Court Appeals, 7th Circuit. Term No. 460. Victor L. Berger et al. vs. The United States of America. (Certificate.) Filed July 29th, 1920. File No. 27,817.

NO. 460

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER et al.
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR.

SEYMOUR STEDMAN,
ATTORNEY FOR PLAINTIFFS IN ERROR.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER et al.
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This cause is brought to this court upon a certificate from the Seventh Circuit Court of Appeals, to determine questions of law whereof the judges, before whom this cause is pending upon writ of error, are in doubt.

On February 2, 1918, there was returned into the District Court of the United States for the Northern District of Illinois, Eastern Division, an indictment against the plaintiffs in error, charging them with the violation of certain sections of the Act of Congress of June 15, 1917, known as the Espionage Act.

On October 25, 1918, the Honorable Evan A. Evans, a circuit judge in and for the Seventh Judicial Circuit and then sitting in said District Court, heard and passed upon certain demurrers and pleas in the said court, and thereupon, on November 12, 1918,

there was filed in the said District Court by said plaintiffs in error an affidavit of prejudice of the Honorable Kenesaw M. Landis, one of the two judges of the said District Court, which affidavit is in the words and figures following, to-wit:

"To the Honorable Judges of the United States District Court of the Northern District of Illinois, Eastern Division:

Your petitioners, Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, jointly and respectively, respectfully represent that they are defendants in the above entitled cause wherein they are charged with the crime of conspiracy; that his Honor, Judge Kenesaw Mountain Landis, Judge of the United States District Court for said District is presiding over the trial of criminal cases in said court; that the above entitled cause was heretofore presided over by Judge Evan Evans a Judge of the United States Circuit before whom a demurrer in the above entitled cause was presented and argued and before whom a plea of former acquittal was filed by the defendant, Adolph Germer; that said demurrer and plea were ruled upon adverse to these defendants on or about October 26, 1918.

Your petitioners further represent that they presumed that the trial of said cause would probably be presided over by said Judge who heard said motion but that they have been informed within the last week that said cause was on the calendar of and to be presided over by said Judge Kenesaw Mountain Landis unless otherwise provided by the court in accordance with Section 21 of the Judicial Code of the United States.

Your petitioners further represent that they jointly and severally verily believe that his Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to-wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause, and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the

petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: 'If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.' And referring to a German who was charged with stating that 'Germany had money and plenty of men and wait and see what she is going to do to the United States,' Judge Landis said in substance: 'One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace times, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.'

These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, de-

fendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, national Secretary of the Socialist party; William F. Kruse, editor of the Young Socialists Magazine, a socialist publication; and J. Louis Engdahl disapproved the entrance of the United States into this war.

Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries, but verily believe because they are impleaded with Berger, Kruse and Germer that they as well as Berger, Germer and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said Berger, Germer and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case.

Wherefore your petitioners pray that proper proceedings be had in accordance with either Section 20 or Section 23 of said Judicial Code of the United States so that the senior Circuit Judge of the seventh circuit in which said Northern District of Illinois, Eastern Division, is located shall assign a district judge to said circuit other than the said Kenesaw Mountain Landis to preside at the trial of the above entitled cause.

VICTOR L. BERGER
ADOLPH GERMER
J. LOUIS ENGDAHL,
IRWIN ST. JOHN TUCKER
WILLIAM F. KRUSE.

STATE OF ILLINOIS, }
COUNTY OF COOK } ss.

Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, being first severally and jointly sworn on oath say that they are respectively the persons whose names are subscribed to the foregoing petition for designation of a different judge for the trial of the above entitled cause because of the prejudice of the presiding judge; that they are each respectively familiar with the contents of said petition, and that the matters and things therein contained are true in substance and in fact, except such matters and things as are set forth on information and belief and as to such matters and things said affiants believe them to be true.

VICTOR L. BERGER
ADOLPH GERMER
J. LOUIS ENGDAHL
IRWIN ST. JOHN TUCKER
WILLIAM F. KRUSE.

Subcribed and sworn to before me this 8th day of November, A. D. 1918.

IDA T. MAHNKE,
Notary Public.

I Seymour Stedman, attorney for Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, defendants in the above entitled cause, do hereby certify that I have prepared the foregoing petition for change of venue and said petition and application for change of venue is made in good faith.

SEYMOUR STEDMAN,
Attorney for Defendants."

It appears from the record of proceedings in said District Court that after the filing of said affidavit of prejudice and on to-wit November 16, 1918, the following proceedings thereon were thereupon had in the said court before Honorable Kenesaw M. Landis as judge thereof, viz:

"The Court: (To defendants Berger, Germer,

Engdahl, Tucker and Kruse). You have filed a petition here—at all events a petition has been filed here purporting to bear the signature of you five men, subscribed before a notary public on the 8th day of November, 1918: Do you know what I am talking about?

To which question all of the defendants replied 'Yes.'

The Court: Who informed you, Mr. Berger, that this court, meaning this particular occupant of the bench, used this language:

'One must have a very judicial mind indeed not to be prejudiced against the German-Americans in this country; their hearts are reeking with disloyalty; this defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all of the Germans in this country; the same kind of an excuse of the defendant offering to protect the German people is the same kind of an excuse offered by pacifists in this country who are against the United States and have the interest of the enemy at heart by defending that thing that they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country to get away from the Kaiser and the war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same kind that practically all of the German-Americans are in this country. You call yourselves "German-Americans"; your hearts are reeking with disloyalty.'

Where did you get that?

Mr. Stedman (representing plaintiffs in error): I want to object to the examination of petitioners as witnesses on the trial of any issue raised on this petition.

The Court: Is this objection raised at the request of the defendant?

Mr. Stedman: I am representing these persons.

The Court: Your objection is overruled.

Mr. Stedman: Exception.

Mr. Berger: Judge, I am to be guided by my attorney.

The Court: I do not want you to go into anything

that may be involved in the case—all I am asking is this: I assume that you are a man who is interested in the truth. Am I right in that assumption?

Mr. Berger: Yes, sir.

The Court: Now, you heard my inquiry: Who told you that I said this? You heard my question.

Mr. Berger: Yes.

The Court: And you heard Mr. Stedman object to that question. Does he object to that question in your behalf, at your request?

Mr. Berger: He is my attorney and I have no right to interfere with his way of conducting this case.

The Court: Is that the answer of each of the defendants?

(To which each of the defendants replied, 'Yes.')

The court further inquired of the defendants if they understood that all his question asked for was the source of their authority for the assertion that he had used the language quoted in the petition, and the defendants stated that they so understood it, and that they availed themselves of the objection made by counsel.

The court then inquired of Mr. Cochem, Attorney representing Defendant Berger, whether he had made any effort to ascertain the accuracy of the statement alleged to have been made by the Court. Cochem replied that he had not.

The Court: Is there anything you want to say in support of this motion?

Mr. Stedman: Nothing at all.

The Court: The motion is denied.

The Court: I am asking you if the member of the bar, Mr. Johnson, now standing by your side, and who, you informed me the other day was your authority for these facts, does he swear that I made use of that language?

Mr. Stedman: His affidavit is not there, but he does make that statement.

The Court: Does he swear in this proceeding?

Mr. Stedman: No.

The Court: Now further, let me inquire, that language which this affidavit attributes to me in the manner disclosed by the affidavit, as I understood

you to say the other day, is claimed by Mr. Johnson, the gentleman I have referred to, to have been used by me in connection with the disposition of the case of the United States against Weissensel?

Mr. Johnson: That is correct.

The Court: After the verdict, and upon the occasions of the imposition of the sentence?

Mr. Stedman: Yes.

The Court: Mr. Johnson, do you now desire to be sworn to give me your evidence as to this statement for the court to use on passing on the motion for change of venue?

Mr. Johnson: No, sir.

The Court: You are a member of this bar?

Mr. Johnson: I am.

The Court: The motion for the order asked is denied.

Mr. Clyne: Does Mr. Johnson appear as one of the counsel?

Mr. Johnson: Yes, I am one of the counsel.

Mr. Clyne: If your Honor please, we have a stenographic report, if your Honor cares to put it into the record, of what was said on that particular occasion, and we have the reporter here who reported and transcribed it.

The Court: You may file it; not that it is of any interest—

Mr. Johnson: Your Honor, I want to make a statement—

The Court: Anything you desire to say about the facts will have to be made under oath.

Mr. Johnson: I want to make my objection—

The Court: Just a moment. This court, in dealing with a situation of this kind will have to, as it must be obvious, will have to adopt such rules and procedure as will tend to discourage the use of the the change of venue processes authorized by the statutes of the United States as a mere vehicle for the conveyance of slander and libel. Now, anything you want to say about this you will have to present here under oath, in view of your attitude, sir.

Mr. Stedman: I want an objection and exception to the introduction in this case, I understand,—I have not seen it, but there was some purported report offered in evidence by the District Attorney and

I want—I understand it was filed and I want to object to it.

The Court: Object to it being filed?

Mr. Stedman: I object to it being introduced in evidence. Now, do you understand that was introduced in evidence by simply filing it?

The Court: The only interest I could have in that,—my understanding is, that that is probably not admissible; probably incompetent,—in other words, as I understand the general rule, it is at least seriously questionable whether a fact that is averred,—the thing averred as a fact is controverted—

The Court: I will let it go in on this theory: having read that petition, I think that the judge against whom that averment is made, if the averment is not in fact true, if the report upon which the averment was made is in fact untrue, it goes to his own court; the truth should be shown of record in connection with the falsity. Maybe I am powerless in that, I do not know, but this affiant swears that he has been told that I said that the hearts of all German-Americans were reeking with disloyalty. I will let it be filed.

Mr. Stedman: And we take an exception to that.

Be it further remembered that thereafter said motion for a change of venue coming on to be heard on said petition, and the court having heard the arguments of counsel and being fully advised in the premises, the court then and there overruled and denied said petition.

To which ruling of the court the said defendants by their respective counsel, then and there in open court, duly excepted.

Subsequently there was filed herein said stenographic report, same being in words and figures as follows, to-wit:

City of Chicago, } ss.
State of Illinois. }

Hugh P. Lutz, being first duly sworn on oath, deposes and says, that he has been a stenographer and shorthand reporter for over twenty-five years; that for the past five years he has been connected with the United States Attorney's Office, at Chicago, Illinois, as Clerk to the United States Attorney and Assistant United States Attorney; that on Friday morning, November 1, 1918, he was present in the United States District Court, presided over by the Hon. Judge K. M. Landis, for the purpose of taking shorthand notes of the evidence, statements and proceedings in the case of the United States *vs.* August Weissensel, D. C. No. 6390, that this case was called by the Clerk of the Court, for disposition on verdict, that he took such shorthand notes, which said shorthand notes are a true and correct report of statements then and there made and of proceedings that then and there took place, and that the attached seven typewritten sheets contain a true and correct transcript of said shorthand notes.

And further affiant sayeth not.

Hugh P. Lutz.

Subscribed and sworn to before me this 16th day of November, A. D. 1918.

William A. Small,
Notary Public.

In the District Court of the United States of America
For the Northern District of Illinois
Eastern Division.

United States of America
vs.
August Weissensel
} D. C. No. 6390.

Before the Hon. Judge K. M. Landis, Friday, November 1, 1918.

Motion for new trial and in arrest of judgment heard and overruled, and exception. Sentenced to 10 years in the United States Penitentiary at Leavenworth, Kansas, and committed.

The Clerk: 6390. United States *vs.* August Weissensel, for disposition on verdict.

Mr. Johnson: Motion for new trial in that case. At the time the verdict was entered, I talked to the defendant, and he told me at the time, the court advised him,—asked whether or not he wanted counsel; he thought he had to pay for it, therefore, he said that he did not make any request, and was surprised—

The Court: Were you here when I first brought up the subject? He did not tell you the truth,—that is just in line with everything that has been told to you by this defendant. I ordered you into the case—

Mr. Johnson: I never had an opportunity to talk to the defendant,—I simply want to complete my obligation to the court. I feel that there was some matter that came in before the jury, that was irrelevant and prejudicial to the defendant.

The Court: What was it?

Mr. Johnson: Afterwards brought out by the questions of counsel. Mr. Borrelli, after I had asked him question whether he had been arrested, Mr. Borrelli said; you were arrested for wife beating and for drunkenness, and not supporting your wife—

The Court: You asked the man if he had ever been arrested before.

Mr. Johnson: Here is a man sixty some odd years of age, head of a family of six children, living with

his family at the time, and he had never been convicted of crime.

The Court: You didn't ask him if he had ever been convicted of any crime.

Mr. Johnson: I asked him if he had ever been arrested,—it turned out afterwards he had been convicted and sent to the House of Correction. He tells me for refusing to give her any money. That happened over a year ago. He was arrested and sent down two or three years ago. He gave the jury a very bad impression.

The Court: I haven't the slightest doubt about it. You said: were you ever arrested?

Mr. Johnson: I know I did.

The question: Now, was the question of your adversary on cross-examination improper?

Mr. Johnson: He said: you were sent down there for wife beating, weren't you? His answer was, No, and then he told why.

The Court: Just for holding her supplies away from her. That had nothing to do with this.

Mr. Johnson: One of the jurymen called my attention to it, after the case had been disposed of. I know he was very instrumental in it, and I went into it, and furthermore counsel put his own son on the stand to testify, and he didn't ask him question, did your father ever argue anything against the United States, he asked him the question; isn't it a fact that your father always took the side of Germany against the United States, calling for a conclusion.

The Court: I sat here when this thing happened, and that did not happen. Did a juror tell you that?

Mr. Johnson: Not as to that, he did as to the other matters.

The Court: Well, if a member of that jury told you that the jury would have acquitted this man, if it had not been for its coming out that this man had ill treated his wife, why that juror must have been cracked in his head. Now, I doubt whether any juror expresed even an individual juror's opinion, if he used any words to that effect.

Mr. Johnson: Furthermore, Polish witnesses that took the stand, their motive was very apparent.

The Court: The jury saw whatever the motive was. They had the motive. They were trying to enlist soldiers to go over there to fight these people,

—not strange that the Polish should do that in 1918, and this man comes in there and proceeds to shoot off his mouth,—naturally they didn't like it. The strange thing about it to me is, that he went out of the barber shop on his feet instead of on his head, and had the witness been able to carry out what they intended to do, but the man was in the barber chair and these people were taking turn and they were saying something against the Kaiser and the German people, and he took protest because it was against the German people. If they have said anything worse against him that I have said, I would like to know what it is.

Mr. Johnson: I am simply pointing out it was—

The Court: A man in this country now, in 1918, that has such a judicial mind that he can express affection for this thing called the Kaiser, and his darling people, he is a little bit too judicial minded for his safety in this country.

Mr. Johnson: He did not—

The Court: This man did not? He fought his own son, in his own household, month after month, when he had another son in the United States Army.

Mr. Johnson: Yes, and he advised him—

The Court: Have you anything to say in support of your motion for a new trial?

Mr. Johnson: No.

The Court: Overruled, motion in arrest for the same reason and any other reason appearing on the record, overruled and exception. Anything further? Have you anything to say Weissensel before this case is disposed of?

(A) This talk in the barber shop was more heated against the German people than anything else, I believe, and God in heaven made the angels first, and—

The Court: God did what?

(A) Made the angels first before they made Adam and Eve; they are doing things against each other, one nation against each other, and one nation against each other, what should not be, and innocent man for just talking a few words.

The Court: God has been charged with a heap of things in the last few years—

(A) I believe in God in this thing, I had no bad mind, I had nothing against the United States, I

always was a good citizen, I took my papers out in time, 1894.

The Court: What do you mean by being a good citizen?

(A) Always did my duty.

The Court: Do you call it being a good citizen when your country is at war, to stand up and advocate the cause of the country with which your country is at war, in the presence of your own son, do you call that being a good citizen? Do you call having an argument with your own son being a good citizen?

(A) It was when reading paper,—he read one paper and I read one paper, that is all, making big thing out of a little thing.

The Court: You were spending all the energy you had to spend against the fellows from your neighborhood that were over there fighting for you. That is what you were doing.

(A) I was glad to see him in the uniform. I says, go ahead and obey your officer, and be good, do what your mother told you when you was young, what you learned from Sisters and Priest, and never disobey your officer and I will be proud of you. I bid him good-by at Union Station when I saw regiment, he belonged to the 7th Regiment since when he was 18 years old. Now he is 27, and I would like to see him back again.

The Court: I haven't the slightest doubt you would like to see him back,—I can understand that.

(A) And I have another two sons, they be private now too, they over 18 and the other is near 20.

The Court: The case of this man is a case charging violation of the Espionage Act. The charges in the indictment, which is in three counts, are that at various times and places the defendant used this language during this last summer, in the city of Chicago: You will see what Germany will do to the United States; they have got the money; they have got the men. On another occasion: Stop that talk, because I am a German; the Kaiser will soon be in New York and you will see what he will do to the United States. And on another occasion: The Germans will go right through the United States, in which connection the charge is that this defendant used other language to illustrate how the Germans

will go through, he used a well known simile a part of which simile has to do with the celebrated tin horn,—how Germany would go through the United States.

(A) I did not say that.

The Court: I say, you deny it.

(A) Your honor, I never said that.

Mr. Johnson: The man testified that he had not seen the defendant for two weeks, that he had worked with him continuously for two weeks, that during all that time they talked together, and he never heard the defendant say a thing about the war, that he was discharged, and the fact that he was discharged—

The Court: All of this is small stuff compared to the admitted stuff that finally came out on rebuttal, —that in his own home he was preaching this stuff, day after day, to his own son, with another son in the army. This is petty compared with what came out from that witness. I do not have any grave doubt that being matter of—in trial of the case to bring it out; that would have been proper on the main case on the proposition as going to the question of intent. Now this is the kind of thing that has been going on here for months. This man is the type of man that has been more efficient, to use the term that his native countrymen love,—efficient in his operations, than any other class of offenders we have got. It is just this type of man that has branded almost the whole German-American population. One German-American like this fellow, going about talking this stuff, does more damage to his people, and by his people I man, born in Germany and after they come here, than thousands of these people can overcome by being good and loyal citizens over here. That is his real offense,—it is a case of a man who came here 40 years ago and more probably kicked out of Germany, or crawled out, or dodged—

(A) I—

The Court: Did you want to serve in the army over there? Well, ducked out.

(A) I left the old country, I have my papers, all passes—

The Court: Now this type of man came here, then the time came when this fight came on. This fellow

wouldn't even stay there and go through with the army, he didn't love it enough to do that, but he had such an affection for it that he ducked away and got across the sea to this country solely to miss that thing,—that was the depth of his affection at a time when affection for that thing over there meant something, he came over here, lived here all these years, then the time came when that thing was fighting for its life, and when we were fighting for our lives, and the only expression that this man had in his heart respecting that controversy was of affection for that thing back there. I say he is an ideal illustration of the occasional American of German birth whose conduct has done so much to damn the whole ten million in America. Now I am telling him and you too when I say that; he had a son in the army, a volunteer in the army for the United States; he had another son in his own home coming of age to be a volunteer, and under those conditions this man, day after day, and day after day, went to the mat with that boy, advocating the cause of Germany to that boy.

The Court: Give me the statute: Good citizen,—he would have been a better citizen if he had been burglarious all the forty years in America, if he had stood up now, because I know personally of some burglars, I have a personal knowledge of a safeblower, a man I have known for 9 years personally. He is a good soldier, he has done fine. In time of peace he was that kind of a man. I know that man. He is a friend of mine. As between that safeblower by profession, now a soldier in France, and a man like this man who never blew a safe or picked a pocket, but who at this time has done what this man has done, I vote for the safeblower. He is the better citizen of the two. So far as his argument about the newspapers is concerned, it shows a heart reeking with disloyalty. He takes issue with certain statements made in the newspapers. Under this espionage act,—what is the age of this man?

(A) 53, 21st of June.

On account of that son that is in the army, I am going to give him a credit of 50%,—that son is in the army, that he did not support; that son is in the army, to whose burden this Father added consciously and deliberately, in consideration of that son, this

will be half of what it would be if it were not for that son in the army. 10 years at Leavenworth. Exception to the judgment prayed, allowed 60 days for bill of exceptions.

The Court: Call your next."

No further proceedings appear of record respecting said affidavit of prejudice.

Thereupon the said cause proceeded to trial before said Judge Landis. The jury found plaintiffs in error guilty, and they were each sentenced by said Judge Landis to twenty years imprisonment.

QUESTIONS SUBMITTED BY THE COURT OF APPEALS.

1. Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the Act which provides for the filing of affidavit of prejudice of a judge?

2. Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

3. Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

FRANCIS E. BAKER,
SAMUEL ALSCHULER,
GEORGE T. PAGE,
Judges United States Circuit Court of Appeals, Seventh Circuit.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from one to sixteen, inclusive, contain a true copy of the questions certified to the Supreme Court of United States pursuant to an order of this Court entered on June 24, 1920, in the case of Victor L. Berger, Adolph Germer, William F. Kruse, Irwin St. John and Louis Engdahl vs. United States of America No. 2710, October Term, 1919, as the same

remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of June, A. D. 1920.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

POINTS AND AUTHORITIES.

I.

"Statutes in regard to changes of venue are ordinarily construed liberally."
40 Cyc. 117.

"Procedures relating to change of the place of trial should be liberally construed and a substantial compliance with its terms is sufficient."
Buck v. *City of Eureka*, 97 Cal. 135.

II.

As a rule statutes conferring a right to a change of venue or removal should be construed liberally and if possible, so as not to defeat the right.
16 C. J. 203.
Gardner v. *State*, 24 Ore. 261.
State v. *Sasse*, 72 Wis. (3-5, 6).
Fajardo v. *N.*, 23 Porto Rico (71).

III.

All of the defendants joined in the application and this conforms to the narrow requirement of statutes and authorities which hold that all co-plaintiffs and co-defendants must join in the application or petition.
Henry v. *Speer*, 201 Fed. (869) (C. C. A. 5th C. I. R.)
40 Cyc. 146 which cites as authority *Knickerbacher Insurance Co.* v. *Tolman*, 180 Ill. 106.
Griffin v. *Leslie*, 20 Md. 15.
Dowling v. *Allen*, 88 Mo. 393.

IV.

The trial judge "is relieved from the delicate and trying duty of deciding upon the question of his own qualification."

Henry v. *Speer*, 201 Fed. (869) (C. C. A. 5th C. I. R.)

40 Cyc. 146, *Knickerbacher Insurance Co.* v. *Tolman*, 180 Ill. 106.

Griffin v. *Leslie*, 20 Md. 15.

Dowling v. *Allen*, 88 Mo. 393.

ARGUMENT.

The motion for a change of venue was presented in this cause in conformity with Sec. 20 and 21 of Chapter One, entitled "The Judiciary," Fed. Statutes Ann., Vol. I, Supplement 1912; Barnes Fed. Code, 781, 782. Latter Section reads as follows:

> "Whenever a party to any action or proceeding civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a *personal bias or prejudice* either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit of action."

The petition for a change of venue or renewal was filed on the 8th day of November, 1918 (P. R. p. 114), in which it was averred by the petitioners, jointly and severally, that the cause in which they were defendants, that is, Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, and which

was pending before his Honor, Judge Kenesaw Mountain Landis, judge of the United States District Court, was presided over by Judge Evan Evans, a judge of the United States Circuit Court, before whom a demurrer in the above entitled cause was heard and argued and before whom a plea of former acquittal was filed by the defendant Adolph Germer. Said Judge Evan Evans on October 26, 1918, overruled the demurrer to the indictment and sustained a demurrer filed by the government to the plea of a former acquittal interposed by Adolph Germer; that the defendants presumed said trial would be presided over by said judge who heard the motions on the demurrer and the plea of former acquittal, and they were "informed within the last week that this cause was on the calendar of and would be heard by Judge Kenesaw Mountain Landis." The petition, was dated November 8, 1918, and filed on the said date, recited that the petitioners, jointly and severally, "believe that his Honor, Judge Kenesaw Mountain Landis, has a *personal bias and prejudice* against certain of the defendants, to-wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause impleaded with J. Louis Engdahl and Irwin St. John Tucker in this case, all of whom *join* in the petition. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." And referring to a Germer who was charged with stating that Germany had

money and plenty of men and wait and see what she is going to do to the United States, Judge Landis said in substance:

> "One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in the country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by *pacifists* in this country who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from German to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all of the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safe-blower."

The defendants all joined the application for change of venue, and it was sworn to by them severally and jointly. A certificate was attached to this on the 8th day of November, 1918, by Seymour Stedman, attorney for the defendants, certifying that he prepared the petition for change of venue, the application, etc., and that it was made in good faith.

In support of the petition, we respectfully call the court's attention to the case of Henry V. Speer, 201 Fed. p. 869 (C. C. A. 5th Cir.), in which on page 871 the court says:

"Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature; that is, it is meant to afford relief from adventitious predicaments which fair-minded men recognize should be relieved against, when they in fact exist. In affording this relief the Congress has expressed itself plainly and perspecuously. It is not difficult to arrive at its true intent and meaning. We hold the provisions of section 21 to be available, even though the cause of action in which they are invoked arose and was commenced before the time the Judicial Code became effective.

In the enactment of section 21 the plain purpose of the Congress was to afford a method of relief through which a party to a suit may avoid trial before a judge having a *personal* bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against the suitor making the affidavit or in favor of his opponent. The statute qualifies the words bias and prejudice by the single word 'personal.'

Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has *no other or further duty to perform* than that prescribed in section 20 of the Judicial Code. He is *relieved from the delicate and trying duty* of deciding upon the question of his own disqualification."

The attorney for the government offered a transcript of evidence, which the court permitted to be filed, stating the controversy between the court, the lawyer and the defendant in the case of *United States* v. *Aug. Weissenel* (P. R. p. 122), which, although interesting, can have no bearing upon the issue raised by the motion and affidavit for a change of venue, for the reason, as stated in the case of *United States* v. *Speer, supra*, the judge is relieved

from the duty of determining the fact as to whether he has a personal bias or prejudice or a bias against "the defendants" or whether there exists a "prejudice" of said Judge Landis against said Berger, Germer, Kruse, etc. (P. R. p. 117.)

In the case of *Jones* v. *Chicago & Northwestern R. R. Co.*, 36 Iowa, p. 68, the court held that "an application for a change of venue cannot be met by counter affidavits," and in support of this see the case of *Smith* v. *Amies, Trustee*, 30 Ind. App. Ct. Rep., p. 530.

The Federal Statute makes a change of venue mandatory and the author says (40 Cye. 163):

> "where the granting of the change of venue is mandatory upon the filing of an application or affidavit in proper form, the adverse party has no right to file counter affidavits."

The Federal Statute provides specifically the method to be pursued to obtain removal from a judge who is deemed disqualified by reason of a personal bias and the language of the Act is "Every such affidavit shall state the facts and reasons *for the belief* that such bias or prejudice exists." From this it is clearly apparent that the gist of the application is the belief of the applicants that the judge has a personal bias against the moving party. Obviously it would be impossible to state as a fact what is in the mind of the presiding judge.

The same Act further provides for a statement of facts upon which this belief is based and an affidavit stating facts upon information and belief is no less a statement of facts because they are so stated to be upon information and belief. To require the applicant to know of his own knowledge the facts upon which the petition is based would nullify the purpose and object of this Act.

The suggestion that the charge of perjury would not lie against persons making a statement upon information

and belief is erroneous for the reason that if a sworn statement upon information and belief is false and known to be such, it would subject the affiant to prosecution and conviction. There is no provision in the Act permitting the statement of facts by persons who are *not* parties to the suit. The application of the moving parties must contain the essential elements upon which to predicate the right for a change of venue or renewal. Therefore, it was evidently within the contemplation of Congress and within the meaning of the Act that the privilege should be afforded the litigants where there was a well-founded belief that the presiding judge had a personal bias and the allegation of facts required was evidently for the purpose of showing the good faith and honesty of the parties making the application.

The prejudice and bias of a judge against a class of persons includes a bias and prejudice against each member of the class. If a judge had a bias and prejudice against the Irish, this would include a prejudice and bias against any single Irishman who might come before him for trial and we need not recall the historic evidence of this fact based on racial and religious hatreds and antipathies.

Respectfully submitted,

SEYMOUR STEDMAN,
Attorney for Plaintiffs in Error.

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NO. 480

IN THE

Supreme Court of the United States

October Term, A. D. 1950

VICTOR L. STEDMAN, Jr.,
Appellant in Error,

vs.

THE UNITED STATES OF AMERICA,
Appellee in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM PROHIBITION.

VICTOR L. STEDMAN,
Appellant in Error in Pro Per.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER et al.
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO DISMISS OR ABATE PROSECUTION.

Comes now the attorney for the plaintiffs in error and moves the Court to dismiss this case and order the discharge of the defendants or abate the further prosecution thereof and for reason thereof, says that the plaintiffs in error, Victor L. Berger, Adolph Germer, William F. Kruse, Irwin St. John Tucker and J. Louis Engdahl, were indicted by the grand jury of the District Court of the United States, Northern District of Illinois, Eastern Division, on the 2d day of February, 1918, charged with conspiracy to violate Section 3 of Title I of an Act of Congress, approved June 15, 1917, and entitled "An Act to Punish Acts of Interference with Foreign Relations, The Neutrality and the Foreign

Commerce of the United States, and to Punish Espionage and Better to Enforce the Criminal Laws of the United States".

Said plaintiffs in error were convicted in a trial before the Honorable Kenesaw M. Landis and, respectively, sentenced to twenty years in the penitentiary from which a writ of error was sued out from the United States Circuit Court of Appeals for the Seventh Circuit; and that a petition presented requesting removal or change of venue from said Honorable Kenesaw Mountain Landis, judge of said District Court was overruled by said trial judge, error being assigned thereon and pending before the United States Circuit Court of Appeals based upon the refusal of said trial judge to grant said removal; that said cause is now pending before said Circuit Court of Appeals and said Court has certified to this Court the question of the sufficiency of the affidavit and petition for said removal or change of venue and submits the following questions to this Court:

1. Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the Act which provides for the filing of affidavit of prejudice of a judge?
2. Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?
3. Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment? * * *

We contend in support of our motion that the further prosecution of this case by the government should terminate by an order directing the dismissal of this cause or that the prosecution abate during the period while we are not "at war" with the Imperial German Government

because we are not now at war with the Imperial German Government as the Act upon which this prosecution rests is now repealed or has abated as a result of peace or the discontinuance of war.

We respectfully submit and file briefs in support of this motion.

Respectfully submitted,

SEYMOUR STEDMAN,
Attorney for Plaintiffs in Error.

NO. 460

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER, et al.,
Plaintiffs in Error,

vs.

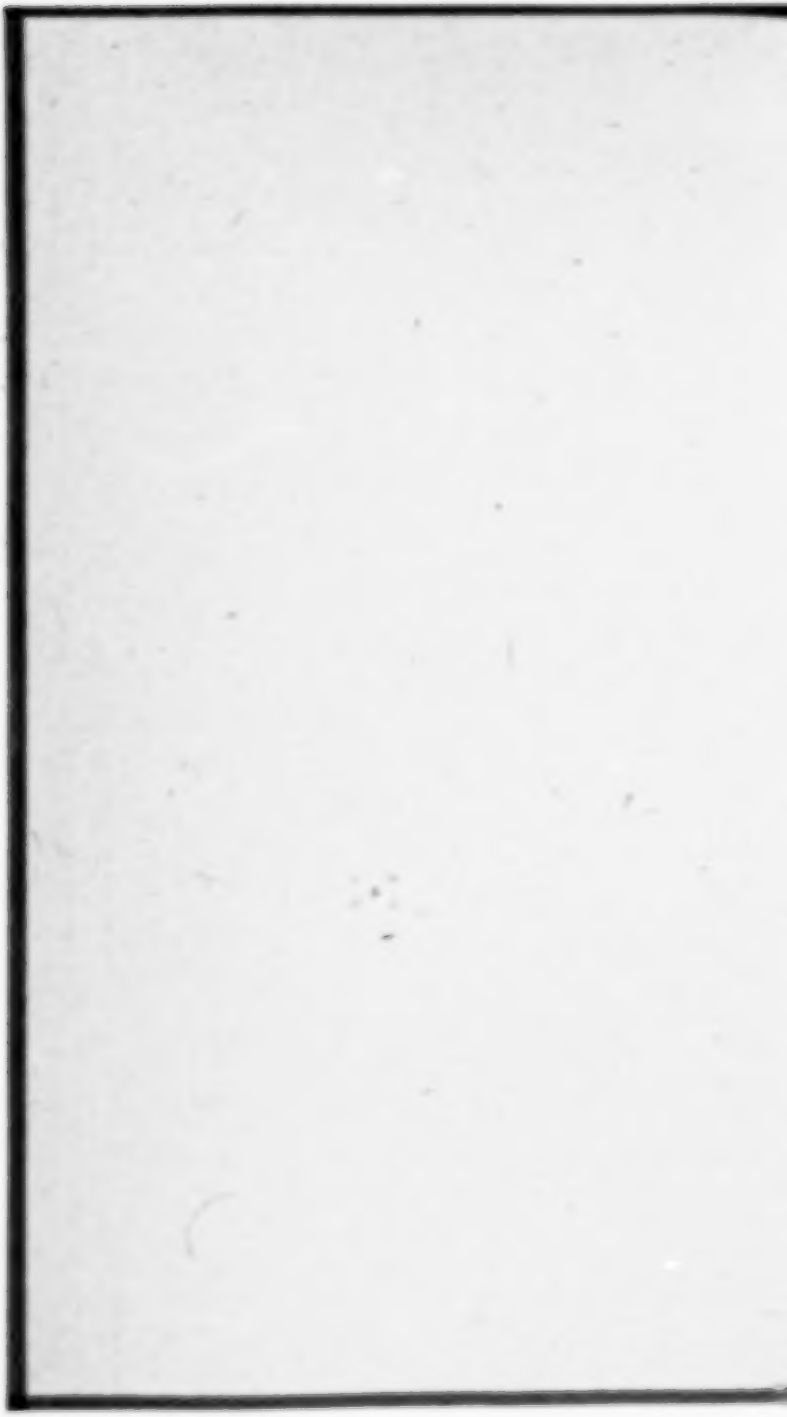
THE UNITED STATES OF AMERICA.
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR ABATE PROSECUTION.

SEYMOUR STEDMAN,
ATTORNEY FOR PLAINTIFFS IN ERROR.

BYRON S. ADAMS CO., LAW PRINTERS, CHICAGO.



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AUTHORITIES

NOTE: The brief and argument supporting the contention that the joint resolution of Congress passed May 27, 1920, declaring peace, establishes peace, is taken substantially from the brief filed by Harry S. McCartney, *pro se.*, in case No. 599, pending in this court, entitled United States of America *ex rel.* Harry S. McCartney v. Bainbridge Colby, Secretary of State, and Henry L. Bryan, Editor of Laws.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER et al.
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR ABATE PROSECUTION.

Supporting said motion we submit the following:

1. Meaning of, "is at war."
2. The United States "is" not now "at war."
3. The expiration or repeal of a law without a saving act stops prosecutions thereunder.
4. This applies to cases pending upon appeal.

The section of the Act under which this prosecution is brought, that is, Section 3 or what is commonly known as the Espionage Act, provides that

> "*whoever, when* the United States *is AT war* shall willfully make or convey false reports, * * * obstruct the recruiting or enlistment service * * * cause or attempt to cause insubordination shall be punished, etc."

The meaning of "is at war" it is important to determine as distinguished from war, or a technical war.

5. Congress by resolution has the power to make and declare peace—this is argued.

War.

War in a legal sense has been defined to be "the state of nations among whom there is an interruption of *all* pacific *relations and* a general contestation of arms authorized by the sovereign. *Bishop* v. *Jones,* 28 Tex. 494-319; Elizabeth Ann. 1st Dods, p. 344; The Nayade Fourth, See Robinson 251, 235.

War in the broad sense, is a properly conducted contest of armed public forces. In a narrower sense war is a state of affairs during the continuance of which the parties to the war may *legally exercise force* against each other; 40th Cyc. p. 343.

There is a distinction between war in a material sense and war in a legal sense. The Three Friends, 166 U. S. p. 1.

The existence of war in the material sense is evident in the use of force by the parties. *Lewis* v. *Ludwig,* 6 Coldw. (Tenn.) 368. *Underhill* v. *Hernandez,* 168 U. S. 250.

The existence of war in the legal sense is determined by the authorized political department of the government. The Pedro, 175 U. S. 354; Prize Cases, 2nd Black (U. S.) p. 635.

Definitions

Of the verb "is"

Is, is the present indicative of, be. Be means in a state of existence, in a special state, manner or relation. In relation to the word "at" it means *active.* War is made active by the preposition "at" and with, to be, clearly means a present state of active war.

Of the Preposition "at"

Standard Dictionary (Students' Edition) at, in contact with; on; upon; *of motion;* in the direction of; in pursuit of; in quest of; engaged in; occupied with.

Webster's New International Dictionary 4. At, situation in an active or passive state, in a posture, circumstance or mode; as, the stag *at* bay; *at* war.

Bouvier: at, expresses position attained, by motion to.

We Are Not Now at War.

On November 11, 1918, the President of the United States, addressing both Houses of Congress, and referring to the armistice which had been signed said:

> "The war thus comes to an end; for having accepted these terms of armistice it will be impossible for the German nation to renew it. * * * It is not now possible to assess the consequences of this consummation. We know only that this tragical war, whose consuming volume swept from one nation to another until all the world was on fire, is at an end."

On June 28, 1919, the President signed the Treaty of Peace with Germany. On July 10, 1919, he presented the Treaty to the Senate and formally declared to the Senate that,

> "the war ended in November, eight months ago." On November 30, 1919, the War Department officially declared that "in general the accident of war and the progress of demobilization are at an end." On October 27, 1919, the President in vetoing the Volsted Bill, which sought to enforce the war-time Prohibition Act, stated that the objects of the latter "having been satisfied in the demobilization of the army and navy, and whose repeal I have already sought at the House of Congress."

On November 11, 1919, General Pershing in an Armistice Day announcement to the people of the United States said:

> "Our armies have been demobilized and our citizen-soldiers have returned again to civil pursuits with the assurance of their ability to achieve therein the success they attained as soldiers."

RESOLUTION. ADOPTED MAY 21, 1920.

House joint resolution (H. J. Res. 327) terminating the state of war declared to exist April 6, 1917, between the Imperial German Government and the United States, permitted upon conditions the resumption of reciprocal trade with Germany, and for other purposes.

That the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and people of the United States, and making provisions to prosecute the same, be, and the same is hereby, repealed, and said state of war is hereby declared at an end: PROVIDED, however, That all property of the Imperial German Government, or its successor, or successors, and all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under the control of the Government of the United States or any of its officers, agents or employees, from any source or by any agency whatsoever shall be retained by the United States and no disposition thereof made, except as shall specifically be hereafter provided by Congress, until such time as the German Government has, by treaty with the United States, ratification whereof is to be made by and with the advice and consent of the Senate, made suitable provision for the satisfaction of all claims against the German Government of all persons, wheresoever such persons have suffered, through the acts of the German Government or

its agents since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, through the ownership of shares of stock in German, American or other corporations or have suffered damage directly in consequence of hostilities or of any operations of war, or otherwise until the German Government has given further undertakings and made provision by treaty, to be ratified by and with the advice and the consent of the Senate, for granting to persons owing permanent allegiance to the United States, most favored nation treatment, whether the same be national, or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce, and industrial property rights, and confirming to the United States, all fines, forfeitures, penalties, and seizures imposed or made by the United States during the war, whether in respect to the property of the German Government or German nationals, and waiving any pecuniary claims based on events which occurred at any time before the coming into force of such treaty, any existing treaty between the United States and Germany to the contrary notwithstanding.

SEC. 2. That in the interpretation of any provision relating to the date of the termination of the present war of the present or existing emergency in any acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the date of the termination of the war or of the present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war, or of the present or existing emergency, notwithstanding any provision in any act of Congress or joint resolution providing any other mode of determining the date of the termination of the war or of the present or existing emergency.

SEC. 3. That until by treaty or act or joint resolution

of Congress it shall be determined otherwise, the United States, although it has not ratified the treaty of Versailles, does not waive any of the rights, privileges, indemnities, reparation, or advantages to which it and its nationals have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof or which under the treaty of Versailles have been stipulated for its benefit as one of the principal allied and associated powers and to which it is entitled.

SEC. 4. That the joint resolution of Congress approved December 7, 1917, declaring that a state of war exists between the Imperial and Royal Austro-Hungarian Government and the Government and the people of the United States and making provisions to prosecute the same, be, and the same is hereby repealed, and said state of war is hereby declared at an end, and the President is hereby requested immediately to open negotiation with the successor or successors of said Government for the purpose of establishing fully friendly relations and commercial intercourse between the United States and the Government and peoples of Austro-Hungary.

Authorities Holding That a Treaty of Peace Is Not Absolutely Necessary to Establish a State of Peace.

PHILLIMORE: There appear to be three ways by which war may be concluded and peace restored:

1. By a *de facto* cessation of hostilities on the part of both belligerents and a renewal *de facto* of the relation of peace.

2. By the unconditional submission of one belligerent to another.

3. By the conclusion of a formal treaty of peace between the belligerents.

A formal declaration on the part of the belligerents that war has ceased, however usual and desirable, can not be said to be *absolutely* necessary for the restoration of peace. War may silently cease and peace be silently renewed. So ended the war between Sweden and Poland in the year 1716; namely, by a reciprocal intermission of hostilities; it was not until after the lapse of 10 years that peace was formally and *de jure* recognized as subsisting between the two kingdoms.

In such a state of things the presumption of law would be that both parties had agreed that the *status quo ante bellum* should be received. Yes, in the absence of any formal declaration, it would not be concluded that the claims which had given occasion to the war, or which had grown out of the war, were abandoned, but they must be considered as in abeyance. In fact, it is as difficult to predicate the consequences, legal and practical of such a state of things as it would be to predicate the consequences of a treaty of peace which contained no clause of amnesty. (Phillimore, Sir Robert, International Law Pt. 12, ch. 1, pars. 510, 511.)

OPPENHEIM: Be that as it may, a war may be terminated in three different ways. Belligerents may, first, abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty. Or, secondly, belligerents may formally establish the condition of peace through a special treaty of peace. Or, thirdly, a belligerent may end the war through subjugation of his adversary.

The regular modes of termination of war are treaties of peace or subjugation, but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end. Thus ended in 1716 the war between Sweden and Poland and in 1720 the war between Spain and

France, in 1801 the war between Russia and Persia, in 1876 the war between France and Mexico. And it may also be mentioned that, whereas the war between Prussia and several German States in 1866 came to an end through subjugation of some states and through treaties of peace with others, Prussia has never concluded a treaty of peace with the Principality of Lichtenstein, which was also a party to the war. Although such a termination of war through simple cessation of hostilities is for many reasons inconvenient and is therefore, as a rule, avoided, it may nevertheless in the future as in the past occasionally occur. (Oppenheim, L. International Laws, Secs. 261, 262.)

Hefftter: It is not necessary that the termination of a state of war shall be formally declared by the belligerent parties, although it is advisable and customary. Hostilities may be silently ended. After friendly relations have thus been re-established neither party may claim privileges which may accrue from a continued state of war. (Heffter, A. W., Das Europaische Vokerrecht der Gegenwart, Sec. 177.)

Seward: It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.

The proceedings of Spain and Chile which have been referred to, although conclusive, require an explanation on the part of either of those powers which shall insist that the condition of war still exists. Peru, especially with Spain, has an absolute right to decline the good offices or

mediation of the United States for peace as either has to accept the same. The refusal of either would be inconclusive as evidence of determination to resume or continue the war. It is the interest of the United States, and of all nations, that the return of peace, however it may be brought about shall be accepted whenever it has become clearly established. Whenever the United States shall find itself obliged to decide the question whether the war still exists between Spain and Peru, or whether that war has come to an end, it will make that decision only after having carefully examined all the pertinent facts which shall be within its reach, and after having given due consideration to such representations as shall have been made by the several parties interested. (Seward, W., Secretary of State, to Mr. Goni, Spanish minister, July 9, 1868, U. S. Diplomatic Correspondence, 1868, II. 32, 34.)

VATTEL: We shall, therefore, content ourselves with observing that in case of a pressing necessity, such as is produced by the events of an unfortunate war, the alienations (of a part of a state) made by the prince in order to save the remainder of the state are considered as approved and ratified by the mere silence of the nation, when she has not, in the form of her government, retained some easy and ordinary method of giving her express consent, and has lodged an absolute power in the prince's hands. (Vattal, E. de, Law of Nations, Book IV, ch. 2, sec. 11.)

HALL: War is terminated by the conclusion of a treaty of peace by simple cessation of hostilities, or by the conquest of one, or of part of one, of the belligerent states by the other. (Hall, W. E. A. Treatise on International Law, III. ch. 9.)

Effect of Termination of War Through Simple Cessation of Hostilities.

OPPENHEIM: Since in the case of termination of war through simple cessation of hostilities no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the status which existed between the parties before the outbreak of war, the *status quo ante bellum*, should be revived, or the status which exists between the parties at the time when they simply ceased hostilities, the *status quo post bellum* (the *uti possidetis*), can be upheld. The majority of publicists correctly maintain that the status which exists at the time of cessation of hostilities becomes silently recognised through such cessation, and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance regarding enemy territory militarily occupied by a belligerent at the time hostilities cease. According to the correct opinion, such territory can be annexed by the occupier; the adversary, through the cessation of hostilities, having dropped all rights he possessed over such territory. On the other hand, this termination of war through cessation of hostilities contains no decision regarding such claims of the parties as have not been settled by the actual position of affairs at the termination of hostilities, and it remains for the parties to settle them by special agreement or to let them stand over. (Oppenheim, L. International Law, sec. 263.)

Effect of Rejection of Ratification of Peace Treaty.

FIORE: As soon as the decision not to ratify the treaty has been finally reached, the law of war shall once more be in full force and hostile acts may again be undertaken without reservation or condition. (Fiore, Pasquale, International Law Codified, sec. 1962.)

WESTLAKE: The contracting authorities, of whom only one can, in general, be present at the court where the treaty is signed, reserve to themselves the power to conclude finally. The ratification may be refused by any party; and although this would be offensive if done without grave reason, it is impossible to limit the right of doing it, and there are sufficient examples of its being done even by foreign ministers who all along had control over the negotiations. Where the contracting authority is shared by a body having no such control, as the Senate of the United States, refusal of ratification may result from the exercise of independent judgment, and is very natural. Such a body will occasionally attempt to qualify its ratification by a modification of the terms of the treaty, but such a proceeding is nothing more than the proposal of a new treaty, which may or may not be accepted. (Westlake, J. International Law, Pt. I, ch. 12.)

Instances Where Ratification of Treaties Was Refused.

TWISS: It may happen after a treaty has been signed by the plenipotentiary of a nation that grave circumstances occur under which the provisions of the treaty may be likely to have a prejudicial effect upon the interests of that nation which were not known at the time to signature. Under such circumstances the sovereign power of a nation is by usage justified in declining to ratify the treaty. Thus, the King of the Netherlands refused in 1841 to ratify the treaty for the incorporation of Luxemburg into the Customs Union of the Germanic States on the ground of the injurious effects which it was likely to exercise upon the commercial interests of his subjects, which had been brought to his knowledge subsequently to the signature of the treaty. So the King of the French declined in 1841 to ratify the quadruple treaty for the suppression of the slave trade on account

of the objections raised against it in the French Chambers. So Great Britain declined in 1859 to ratify a treaty which her minister plenipotentiary had concluded with Nicaragua, and Nicaragua in the same year declined to ratify her convention with Great Britain for the settlement of the Greytown and Mosquito question. If, however, there should be an express provision that the preliminary engagements shall take effect immediately without waiting for the exchange of ratifications such a treaty will be an exception to the rule. (Twiss, T., the Law of Nations, sec. 233.)

The Joint Resolution of Congress Dated May 21st Established Peace.

I.

1. The constitutional provision that the President, with the advice of two-thirds of the members of the Senate, can "make treaties" (Clause "Second," §2, Art. II), does not empower such special tribunal to make peace; nor was such grant intended to conflict with the full war powers of Congress—that is, power in the latter body to declare war and of necessity to declare it at an end—in other words to make peace.

2. The Congress itself by the usual majority vote has inherent primary power both to declare war and to make peace. Such power is inherent from the mere fact that Congress has been constituted and is the primary legislative medium for expression of the will of the people at large, the real sovereigns of the nation.

3. The express grant to Congress of a general power "to declare war" (clause "Tenth," §8, Art. I), is simply

an express confirmation of general war powers existent in such body. The grant to the President-Senate special and limited tribunal,—created for the one purpose of making "treaties,"—is only a grant generally to such tribunal to make compacts, i. e., contracts, between this and other nations in due and ordinary course of affairs; and such power or grant does not extend to or cover the abnormal and exceptional situation of a state of war—nor to any interference with the war powers of Congress.

4. Hence, the peace resolution declaring the war at an end, passed by Congress on May 21st last and repealing the two prior acts of 1917 declaring a state of war as existent between this country and the Central Powers, was a valid exercise of the war-and-peace powers of Congress, and such resolution is in full force and effect today.

5. The veto power of the President extends only to matters of "ordinary legislation" by Congress and not to acts or resolutions of that body upon fundamental matters affecting sovereignty itself, as for instance a declaration of war or a declaration of peace. And the attempted "veto" of said Act by the President was and is a mere nullity.

6. This principle has been sustained as applied to acts of Congress in submitting constitutional amendments for ratification by the states. (*Hollingsworth* v. *Virginia*, 3 Dall. (U. S.) 378; *Hawke* v. *Smith*, 40 Sup. Ct. Rep. 495 (498), July 1, 1920; and other citations cited *infra* in Argument.) The power to make war and peace—a power which involves the immediate defense of sovereignty against threatened extinction—is of a still higher—in fact the highest—plane of exigency and importance. And a fortiori such principle applies to it.

Preliminary.

Throughout all the official discussions and all the agitations in the public prints over the issue of making peace with the German Republic and its allies, uttered and published since the armistice of November 11, 1918, it seems to have been generally and broadly assumed that there is but *one* legally valid way of consummating peace, namely, under the constitutional clause that "he" (the President) "shall have power by and with the advice and consent of the Senate, to *make treaties,* provided two-thirds of the senators present concur."

Apparently, the question never seems to have seriously entered any one's mind whether—assuming that such clause included the power to *make peace*—such power so granted was an *exclusive power,* to be exercised or not under *any and all* circumstances; or whether there must not *of necessity* exist *inherent power* either in *Congress or* in the people at large—*i. e.,* the electorate legally representing them—to make peace, *independently* of or in spite of such alleged grant of power to the President and Senate, and particularly in a case where the President and Senate shall have been unable to agree after having made one formal effort therefor, or after the expiration of a "reasonable time."

It would seem clear to any thoughtful and unprejudiced citizen of common sense, unhandicapped by exacting daily private or official duties, and having time to fully reflect on the subject, that if the clause quoted above were the *sole and only* method by which it is *legally possible* for our nation to consummate peace with an actual warring belligerent, *then* it would result that the President could actually exercise a physical power, *in and of himself alone, to continue the war.* He could do this by merely declining to submit *any* draft of treaty to the Senate; or,

having submitted one which it declined to conform, by refusing to submit *any other. Such a power so exercised would be almost as arbitrary as that ever exercised by any monarch in the world's history,* that is, a *power to continue a war* when perhaps practically the entire nation and all the people at large desired peace and were clamoring to have it declared upon the terms offered by the warring belligerent.

What does it all mean?

To test out the question, let us suppose that in 1914 the territory of Germany adjoined that of our own; that, acting upon the order of its Kaiser, it had declared war against us, or, dispensing with such a "scrap of paper" declaration, its army cohorts of millions had actually invaded and overrun a large, say the larger, portion of our country; and suppose, too, that, after a while, the Kaiser had been dethroned and the new German Republic established; and that shortly thereafter, while 10,000 human lives were going out each day in the struggle, such new public had offered satisfactory terms of peace, *i. e.,* satisfactory to a majority of Congress and generally to the people at large. Would the President of the United States—*one man*—have the physical power *to block indefinitely the making of peace and thus decree that the human slaughter and widespread distress and destruction of property, etc., should continue—until the German republic should offer and two-thirds of the Senate members should consent to certain specific terms drafted or approved by himself alone?*

Of course, such a thing could not be and hence *cannot* be. And to assume or claim that our President possesses such a power would be to condemn the institution of our Government as distintegratively weak to the "very marrow of its bones," and to effectually muzzle our mouths

when we attempted to say before the world at large: "*Our* Government is a *republic*. *Our* President has *no* arbitrary power. He is not an absolute monarch in *any* respect."

Of course, we repeat, such a thing could not be and *cannot* be; and no sane body *forming* a government in these days of humane regime and advanced civilization *would allow any man to assume* such a responsibility for it would *kill* any human *conscious* of possessing it and attempting to wield it—or drive him insane.

And yet *nearly two years* have expired since the Armistice was declared, with no peace yet consummated! Technical war and a non-resumption of trade relationships, of immigration, etc., has continued with no effort on the part of anyone to prompt a testing out of the situation before the courts, or *to bring the ever urgent issue before the people at large*—if necessary so to do. Some more or less vague and informal suggestions have been made on the part of the President that he *would be willing* to submit the issue in some restricted form to the people at large and be guided by their sentimental vote on the subject! And the same sort of suggestions were made on the part not of the Senate, but of various Senators opposing the President's recommended draft of treaty that *they* would be *willing* to do the same thing! And the only tangible (?) thing on this subject now in prospect is the coming election of the next President of the United States and the informal publication of several party platforms, not even *involved* in such election, but merely incident to the *agitation* of such election, *i. e.*, of the *personal merits* of candidates *promiscuously and informally suggested* to the prospective electoral college! Such platforms are not, nor are any specific

"planks" embodied therein, to be formally *voted on* by the people.

All this simply assumes that *Congress* can not *provide for* nor can the *people at large demand* the making of peace when a war is actually raging; but that they are *powerless* to do otherwise than *allow* the President and Senate to make it, *i. e.*, to *allow* a deadlock between them to continue indefinitely, *i. e.*, to *allow* the slaughter, etc., to continue, *i. e.*, to *allow* the entire nation to be wiped out—its government, its constitution, its substance, its life and its property to be physically destroyed!

Again we ask, what does it all mean?

Outline Arugment on Point I.

1. Congress, as the primary legislative body of the people at large, has *inherent* legislative power to make war and to make peace. It has *full war powers*—which certainly means *at least* the power *to end war.*

The express grant in the Constitution to Congress of "power" "to declare war" is simply an *express confirmation of general war powers*—including power to make peace—which war powers exist without and independently of such grant. Such grant of power *"to declare war"* carries with it *of necessity* the power *to declare peace*—as naturally as does the privilege to start forest fires carry with it the privilege to put them out; or as naturally as does power to order the army forward carry with it the power to order it to halt or to retreat; or as naturally as one having power to give should have the power to quit giving.

2. The grant to the President and Senate of power "to make *treaties*" is simply a general grant—*i. e.*, a grant *generally*—to such tribunal to make *compacts* or

contracts between this and other nations in due and ordinary course of affairs; and it does not extend to or cover the *abnormal* and *exceptional situation of a state of war*—nor to an *actual interference* with the *war powers* of Congress.

(*a*) Because, in the first place, the term "*treaty*" and the term "*peace*" are *not identical.* A "treaty" is a mere compact or a contract between nations. 38 Cyc. 962. "A formal agreement or compact, duly concluded *and ratified,* between two or more nations," Standard Dictionary. Also "The act of *negotiating for* an agreement." *Idem.* This nation could be *at peace* with Somaliland and at the same time have no *treaty* with that people.

(*b*) Because the making of contracts applies to *ordinary* dealings and affairs between parties, and not to the *abnormal* or *exceptional.* A power of attorney given to my agent to make contracts or agreements on my behalf with my neighbor Smith does not carry with it power to order me to fight him or to order me to quit.

(*c*) Because all treaties, as well as all other existing contracts, made between this nation and another by the President-Senate agency are broken and nullified by the very *act* of Congress in declaring war. Congress thus has been granted a *greater* power than the one given to the special President-Senate agency or tribunal.

The function of the President-Senate tribunal has to any particular nation against which Congress has declared war is *suspended* during such war; and it is not restored until Congres has restored the normal relationship with that country—fully restored the *status quo*—by making peace and, of course, prescribing the conditions thereof.

3. Congress, it is true, could *allow,* and appropriately

allow, the President and Senate to negotiate a peace, and then bind itself by *adopting* their work or the resultant draft of their negotiations. So, too, there may come an occasion when the making of peace with a warring belligerent may involve or may be thought to involve the consideration of so many questions of permanent commercial intercourse or of some permanent plan of dealing with the adversary nation—or with *it* and *third party* nations—perhaps also with *neutral* nations, etc., etc., that Congress may properly and appropriately *choose* to await the exhaustion of the President-Senate efforts to agree upon the terms of peace before it exerts or exercises its *primary* and *reserve* power in respect to peace. It, however, remains free to exercise such primary or reserve power when such efforts have failed or at any time it may choose to ignore them or further dispense with them. (It happens that this program has been followed in the late negotiations—except probably that most of the congressmen were unconscious of the existence of such reserve power of Congress and particularly of its being capable of being exercised independently of the veto power of the President.)

However, the fact that Congress may have heretofore adopted and may hereafter adopt such a "waiting" course or policy *in particular instances* does not prove or involve the *surrender* of any of its primary and exclusive *powers* with respect to a state of war.

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4. The body granted power to *pass* an act creating a certain situation naturally has power to *repeal* it and to restore the *status quo*.

5. To grant to one body *exclusive power to declare war* and to grant to another body *exclusive power to*

declare peace would be about as uniquely anomalous, incongruous, contradictory and senseless a piece of constitutional legislation as could well be imagined. It would be like giving to one body the privilege to start forest fires and to another the privilege to put them out. It would be like giving to one officer the power to order the army forward and to another the power to order it to halt or to retreat.

It would be ridiculous enough if the bodies were upon the same plane of dignity; while here the one is a body of *general* legislative power and the other exists only for one special narrow semi-administrative function.

Hence the strictest possible rule of construction should be adopted to avoid any such conflict or contradiction in grants.

6. But no such conflicting legislation has been attempted here. Congress has been granted general and unrestricted power to create the abnormal condition of war and the clause "Power to declare war" must be read the same as if it read "To declare war and to declare peace." And if so read, it would not conflict with a power granted at the same time and by the same instrument to the President and Senate *generally* "To make treaties" or "To make contracts with other nations." For the making of contracts relates to the ordinary curriculum of international dealings, while, as said, war powers relate to an *abnormal* situation.

The same result would follow if the Constitution contained, as now, the President-Senate clause "to make treaties" and did not contain any grant of power to any one body in particular "to declare war."

For Congress would then possess inherent war *powers* by having been constituted, primarily, the body to act for the people at large—the body "whose statutes formed

the highest expression of popular will"; and also by virtue of the grant of power to carry out "all other powers vested by this constitution in the Government of the United States." (Clause 17, §8, Art. I.)

Therefore, since the general power "to make treaties" can be given a *natural effect* by *excepting* the power *to make peace in war time* and we can *thus avoid causing a square physical conflict with the operations of Congress* in respect thereto, why not so construe such grant, and as applying to the normal and *not* to the *abnormal*?

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7. The grant, so far as the President is concerned, is simply the grant of power to him *to negotiate* upon the usually complex subjects of commercial, tariff and other like treaties *and* to frame up a satisfactory instrument for submission to the Senate, and *then* to have the same made binding "by and with the *advice* and *consent*" of two-thirds of the members of that body.

Note the language: It is not that the "President *and* Senate shall have power *to make* treaties," but that "the President" is "*to make*," etc., and the Senate to *approve by vote*. This plan of having one person or official perform the work and the other approve it is *appropriate* to the making of *contracts generally* between nations, particularly on complex subjects.

8. If, therefore, the "*making of treaties*," generally speaking, is a different function from that of the "*making of peace*" (or from that of *merely repealing* an act declaring war), there is neither logic nor object in any attempt to make the two terms identical in meaning or scope.

9. But it *is*, however, thoroughly logical to leave untrammeled the *war powers* granted Congress—*i. e.*, power

"to declare war," and *of* necessity the power to declare peace—and hence to *prescribe the conditions* of peace; and *then* to grant *generally* power to the President and Senate "to make treaties"—that is, to cover the *general field* of international compacts.

10. Congress being the sole and supreme legislature for the people, and all war and peace decrees being the *extremest* act of a people, the grant to a special (and hence limited and unlegislative) tribunal, must be *strictly construed*, particularly as affecting a subject so vital as depriving Congress of any part of its own *natural* jurisdiction.

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11. It is now settled law that the function of Congress in submitting or proposing amendments to the Constitution does *not* require any action by the President, and no such proposal has to be submitted to him for his approval or veto; that such negative function of the President applies "only to *ordinary legislation*"; that such act of proposal is not one of ordinary legislation, but that the same *is an act affecting sovereignty itself and is thus independent of and above the Constitution.* (Citations *infra.*)

12. All the more true, then, is it that the act of *declaring war*—or peace—that is, an act expressive of the *war powers* of Congress, is *not* an act of ordinary legislation. Such an act is one of far graver moment and infinitely more exigent than one affecting any slow growing crisis or gradually maturing situation which ordinarily calls for amendment of the Constitution by the comparatively slow process of having the legislatures of three-fourths of the states consider and vote upon such change.

Can anyone imagine a greater and more overwhelming issue than that of war? To meet it under some circumstances may involve the "last call" of sovereignty itself.

War, involving as it does the very existence of the entire nation as such, involves the existence of the *entire constitution* of the nation. For the nation is *broader* than the constitution. And a state once formed and acting can exist without a constitution—"as a commonwealth at common law with a *sovereign legislature* whose statutes formed the highest expression of popular will." (Bryce, Am. Com., p. 464.)

Hence, if the President has nothing to do with a constitutional amendment proposal, *a fortiori* has he nothing to do with that *much graver* act—*an act* declaring war or peace.

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13. The President is *no part* of the *tribunal of Congress*. He belongs to another department of government. Congress exercises the power of legislation. The provision for the exercise of the President's veto power is a condition subsequent—a *contingent* condition that the power exercised by Congress in enacting a certain act may be rendered null upon the *happening of such veto contingency*.

14. There are acts of Congress as an independent and self-sufficient *body* with which the President has nothing to do—outside of the amendment proposal just referred to. Many "concurrent resolutions" of Congress need no presidential action whatever; as, for instance, a "concurrent resolution" to remove an official from office or to appoint committees of investigation of public affairs, or to compel the attendance of witnesses, etc.

In other words with the extremes of *action* by Congress as a body the President has nothing to do.

To test out this veto question thoroughly, let us imagine Congress as it is or would be had no veto power been granted the President.

Take out this constitutional veto grant and what have we left? We have a complete, independent, self-acting body, composed of two houses, which, by means of a majority of each, jointly legislate. Even this body is divided into two separate bodies, each of which can pass its own legislation affecting matters peculiar to its deliberations and to its action, such as appointing investigating committees, exercising the power to summon witnesses, expelling its own members, etc.

These two houses, then, acting jointly, cover three distinct areas or media of power:

First. *Formal* or *administrative* matters, such as the appointment of investigating committees, or the removal of officers from the public service, etc.

Second. The general field of *legislation*, all of which is *under* the Constitution and in subservience to it.

Third. The extreme and most vital functions, *affecting sovereignty itself*, which proceedings are *not* under but are *over* and *independent* of the Constitution. And the instances of such exercise on subjects of sovereignty are the calling of constitutional conventions to make changes in the Constitution, or directly submitting amendments to the Constitution, or exercising war and peace powers—an emergency which may imperil, and immediately imperil, *the existence* of the nation, including its Constitution and everything else.

Now, the grant of the veto power to the President applies to and covers only the second field or area above. And the practical result of the exercise of such power is to nullify the power of Congress in each instance to act *by the natural rule of the majority*, and *to force* it either to act by the far more stringent two-thirds rule—or not to act at all.

The Attempted Veto of the Peace Resolution Was Inoperative and Void.

The veto power of the executive applies only to *"ordinary legislation"* by Congress and *not* to its action upon *fundamental* issues, as for instance proposing amendments to the Constitution.

Hollingsworth v. *Virginia*, 3 Dallas (U. S.) 378.
Hawke v. *Smith*, 40 Sup. Ct. Rep. 495 (498), July 1, 1920.
Hoar Const. Conv. 82.
Jameson Const. Conv., 4th ed. 589.
12 C. J. 693, Sec. 28.
6 R. C. L. 29, Sec. 21.
4 Hind's Precedents House of Representatives, Secs. 3482-3483.
Richardson v. *Young* (Tenn.), 125 S. W. 664 (678).
Haight v. *Love*, 39 N. J. Law 14.
State v. *Sec'y State*, 43 La. Ann. 590 (633).
People v. *Ramer* (Colo.), 160 Pac. 1032.

The governor's veto of a resolution not legislative in character is inoperative and can be ignored.
(Last four cases.)

Such a proposal for amendment is a species of *"superior"*—not ordinary—"legislation."
Dodd, Rev. & Am. State Const., p. 232.

A joint resolution is described as a form of legislation which is in frequent use in this country *chiefly*—but not always—for administrative purposes of a local or temporary character.
Cushing's Law of Legislative Assemblies, Sec. 2403.

And a joint resolution not legislative in character, such as removing a state official from office, does not have to be approved by the governor.

Gray v. *McLendon* (Ga.), 67 S. E. 859 (868).

Hence, as said above, the field of Congressional action covered by the veto privilege extends neither to the gravest or most fundamental acts, on the one hand, nor, on the other, to the lightest or mose routine or "administrative" ones.

II.

In the Alternative.

1. Even if the grant to Senate were worded so as to specifically cover the making of "treaties of peace," such grant would not be construed as exclusive.

2. For such a grant would conflict with the inherent and express war and peace powers of Congress.

3. The strictest construction known to the law would be warranted to avoid a conflict in grants upon such a vital subject.

Outline Argument on Point II.

a. But let us assume for the sake of argument only, that the grant to Senate was meant specifically to cover —was in fact worded so as to *specifically* cover—the making of "treaties of *peace;*" such grant in the very nature of things could not be *exclusive.*

b. For, on such assumption, such grant of power to the President and Senate—a special and limited as well as a non-legislative tribunal, created only for *one purpose,* viz., that of making peace—would have to be construed with the *utmost strictness* as respects the question whether or not such grant is *exclusive.*

A court would be warranted in going to any extremes in construction to save or avoid a physical *conflict* in grants and a deadlock upon a national fundamental issue involving the *very existence* of the nation at large.

c. So construing such supposed specific grant, the law would be: That such special power must be exercised within a *reasonable time;* and upon the failure of such special tribunal to consummate peace in such reasonable time, and particularly after one *full and fully formal effort* to do so had been made, Congress could *then* legally exercise its *primary and reserve power* to make peace, and this of course by a *majority vote.*

d. As respects the war with Germany, Congress has already exercised such reserve power by having passed said joint resolution (H. J. Res. 327), on May 21st last, after the President and Senate for a period of *over one year and a half* succeeding the armistice had *failed* to consummate peace. Such resolution repealed the act declaring war and "declared" the war *"at an end."* As to property seized during the war as "alien" property, it reserved the same for future adjustment by "treaty" to be made with Germany by the President and two-thirds of the Senate members, etc.

(It also reserved the right of this country to insist upon the indemnity shown by the Versailles treaty, etc.)

As respects the Austro-Hungarian people, the act contained no condition or reservation whatsoever.

e. The fact that such resolution was actually certified to the President for his approval and that the same drew forth his formal "veto" does not affect the action by Congress. The "veto" was a mere *idle ceremony,* from the standpoint of legal effect, and *such resolution of Congress is in full force and effect today.*

The Act being self-executing, no formal acceptance or acquiescence by the German Republic in the terms and import of such resolution was necessary *so far as the attitude of this nation* is concerned and the binding effect of the act upon all its officials and citizens.

In other words, even if the grant of the President and Senate were worded: "power to make treaties, *including treaties of peace,*" such latter clause would have to be read as meaning either:

(a) *a.* "In the absence of *prior action* by Congress"—similar to a privilege given the police force to put out a fire before the "fire laddies" should arrive;—or *b,* "in a *reasonable time* after hostilities shall have ceased"—which period in view of the overwhelmingly exigent situation would indeed be reasonably short; or *c,* "*subject to ratification by Congress*" (for a treaty is often used in the sense of "a compact subject to ratification." Standard Dic., *supra.*)

III.

A Specific Grant to Congress of an Exclusive Power to Declare War and a Specific Grant to the President-Senate Tribunal of an Exclusive Power to Declare Peace Would Be So Essentially Contradictory in Import and Effect as to Be Void.

And the net result of such contradictory grants on such a subject would be to leave untrammeled the *inherent* war—and peace—powers of Congress.

Outline Argument on Point III.

1. A grant to one body of exclusive power to *declare war* couched in the most explicit language, and a grant at the same time to another body of *exclusive* power to

declare peace given in just as specific language, would be so absolutely contradictory as that both grants would be void.

2. There are well-known instances of grants by legislatures of states where this principle has been upheld.

3. There is no reason, therefore, why such grants in a *constitution* would not be void, the grant to one body neutralizing the grant to the other. It would be the same as if *each* body were granted at the same time *exclusive* power *to declare war*. And hence, both could not be given exclusive power to *make peace, i. e.,* to end war.

4. This, therefore, would result in leaving the constitution intact in other respects and in leaving the power to declare war where it *naturally* inhered *independently* of such void and ineffectual grants, viz., in Congress.

5. For, to say that Congress would not have power to declare war and to declare peace except by an express grant would be to deny that there existed such a thing as *national sovereignty* by virtue of the various other grants of powers to Congress scheduled in the constitution; and that all of them taken together did not create a nation with the inherent right to *defend and protect* itself.

IV.

The Majority Rule as a Dominating Principle.

Independently of and lying back of the three-barrier argument upon the merits above is another and independent principle, viz.:

1. That the rule of the majority dominates in the formal expression of the will of sovereignty in all crises and on all subjects which directly involve or threaten the existence of sovereignty itself.

That is, there is a margin of jurisdiction—and it is a legal and clear, though perhaps a narrow, jurisdiction—lying between the Constitution on the one hand and anarchy and dissolution on the other in which the rule of the majority controls. The power to declare war or to make peace falls within such margin of jurisdiction.

2. Therefore, even though there were in our Federal Constitution the most clearly worded grant of exclusive power to the President-Senate agency to declare peace, the same would be void—because conflicting with such basal rule of the majority as applied to action by Congress. Congress in declaring war or making peace, acts as the direct representative of sovereignty itself.

3. And this same principle would apply had the President been granted in the most specific language the veto power over the war or peace resolutions of Congress; for the exercise of such power would violate such basal rule of the majority by requiring a two-thirds vote to offset or neutralize its effect. (A forty-nine-fiftieths rule would be no more offensive and void so far as the legal principle is concerned.)

4. The rule announced has been often sustained on precedent and authority as applied to the action of the electorate as the primal representative of the people at large of a state upon issues which are above and independent of their state constitution.

5. Hence, it is thoroughly applicable when Congress acts directly on behalf of national sovereignty and as its primal representative.

6. Therefore, the peace resolution of May 21 last, passed by a majority vote of each House of Congress, is valid since it was the direct action of the direct representative of sovereignty upon a subject which involves to its very marrow the existence of sovereignty and its defense against extinction.

Outline Argument on Point IV.

1. This principle announced in the heading applies to such subjects or issues as are *independent of and above* the constitution. The constitution does not "tally" with sovereignty in scope and dignity. The constitution is a *creature* of sovereignty.

And the making of war or the making of peace is *the most abnormal, the most exigent and exceptional, the most transcendantal of all* the powers of sovereignty, and most definitely demands above everything else the application of such rule.

For the state has a right to save itself and exhaust all its "body" strength to that end, just as the system of the patient exhausts its last atom of physical strength to save his life at the crisis of the fever.

2. The principle can be said now to be well settled by precedents when applied to the action of the electorate as the ultimate or primal representative of the people at large of a state. (Instances cited Point V. *infra.*)

In the case of the United States there is of course a national sovereignty, and there are subjects and issues which involve its existence and its preservation, the same as in the case of one independent state.

3. It may be answered, however, that while any action on such a subject by the *electorate* of the people at large might concededly be valid when exercised by a majority vote, it does not necessarily follow that the rule should obtain when applied to an action by *Congress* which *ordinarily* at least does not so directly represent the people at large as does the electorate; that Congress is in a manner a lesser body or inferior in grade of importance to the electorate, etc.

But the reply is: First, that Congress has been *speci-*

fically authorized to act *directly* for the people in case of war *without* submitting the issue to the electorate. Second, the electorate could not vote upon any issue, even though it be above or beyond the Constitution, without Congress having *first formally submitted* such issue to such body. Third, therefore, Congress must *initiate* such final action and hence of necessity it *shares* with the electorate in *responsibility* therefor; and hence, the rule of the majority of necessity must apply to the action of *each* body acting upon such fundamental issue and to each action or step *necessary* to any final action *at all.*

As said by the New York Court of Appeals, *infra*:

> "*Neither the* **calling** *of a convention* (*i. e.*, by the *legislature*) nor the convention itself is a proceeding *under* the constitution. It is *over and beyond* the constitution."

These vital considerations add another barrier to the three preceding, the entire four of which seem insurmountable and each of which seem to completely disrupt the concept of the grant of an *exclusive* power to the Senate-President tribunal to declare peace; while, *secondly*, two of such four propositions seem each to be sufficient to prove that any *attempt* to grant such an exclusive power would be *void.*

V.

The Precedents.

We now submit the reasoning and the precedents supporting the majority rule as applied to action by the electorate, which support by analogy the claim of the validity of majority action by Congress on subjects directly affecting national sovereignty and its very existence.

PRELIMINARY.

We here again say: That the idea that the sole peace-making power of our great republic, during a state of war validly declared by Congress, rests in the President and Senate and that thus it is within the power of *one man* to dictate the terms of peace in *any* case, no matter how imperiled the country might be in the contest nor how many thousands or tens of thousands of lives were being ground out each day by the gruesome mill, etc., is utterly fallacious. We say it is *more* than fallacious, it is *intolerable*—it is almost maddening. It is in a sense a libel upon our government as such—certainly upon its claims to being essentially and typically a *republic*.

And this being so, the question now pressing against the bosom of the republic is: Where does the power to make peace lie *primarily* and also *ultimately*?

We have attempted to show above that full power to declare war or peace lies in the Congress acting by a majority vote, untrammeled by any veto privilege of the President.

But in futherance of the object *to sound the entire subject to the bottom*, it is germane to show, as we do below, that the *ultimate* powers of sovereignty including war and peace powers, *rest in the people of the country at*

large, to be exercised upon the formal invitation of the Congress, the body constitutionally formed as the primary medium of expression of the people's will and as the primary means of promulgation of their concentrated power and might; and, that upon the submission of any such issue by the Congress directly to the people at any specially called or specially designated general election, a majority vote of the electorate in such instance will be the legal expression of sovereignty itself upon such issue.

This proposition is thoroughly supported in the completely analogous case of state constitutional conventions —called to meet some demand for a needed change in constitutional provisions—which have been treated as *legal*, though called in *direct defiance* of constitutional methods or provisions therefor.

The dominating principle is: that the sovereignty of the state rests in the people at large—they are the real sovereigns—as represented by their electorate, and that such action of the *majority* of the electorate is the *legal* action of sovereignty itself, which is above and independent of the constitution.

If, therefore, the principle applies to the case of a *convention, it applies with all the more directness and emphasis to the case of a submission of the one specific critical issue by the same legislative authority* (which issues the convention calls) and final action by the *same ultimate authority*—a majority of the electorate.

For it could not be contended that the cumbersome and roundabout method could be *valid* and at the same time the *more* direct method of obtaining the expression of the people's judgment on the *same* issue be *invalid*.

And if, too, as we claim above, it applies to the action of the electorate when the latter acts as the immediate voice of the people upon ultra-constitutional issues, it

must of necessity apply to action by Congress in cases when and where such body acts *directly* for the people instead of the electorate *upon such issues.*

If, then, Congress, the national legislature, shall formally submit to the people at a duly called election a draft of treaty, or alternative drafts thereof, or any other appropriate plan of making peace, *such procedure will be legal and action thereunder will be binding on the nation.*

Nor will any alleged doctrine of "States' Rights" stand in the way:

For, while our Constitution provides for amendments or revisions by either of two methods, viz.: (1), by ratification, by the legislatures of three-fourths of the states, of amendments proposed by Congress, or (2), by such measures as may be adopted by conventions held in three-fourths of the states, this does not and cannot *exclude* the method of submitting fundamental changes in the Constitution—or police measures which *pro tanto displace, or modify* or suspend the effect of a plank or two of the existing constitution—*to a majority vote of the individual electors of the entire nation* and without regard to states certainly *at least in a matter that affects the making of war upon the nation at large as a unit.*

Whatever, if anything, is left of the doctrine of "States' Rights" and a divided sovereignty,—pretty well shot to pieces in the Civil War—no one can deny that there is *enough existing national sovereignty* to declare war and defend the United States and this by the decree of its people *acting as a unit.* Hence the same is true as to declaring peace.

Outline Argument on Point V.

1. This power on the part of the people—while ever existent and never suspended—cannot be exercised or taken promiscuously. It can legally be taken, only in response to a formal or *official call* of its legally constituted acting body, viz.: its *legislature*.

2. A call issued by an informal or spontaneous body or assembly to the people to vote on such issue would not suffice. And in case the same had been issued and even if there had been an election held under it and an affirming vote of a majority, great or small, the courts on application would enjoin further proceedings under the call and hold such action void. *Luther* v. *Borden*, 7 How. 19.

3. Yet the whole question being *largely a political* question, it is nevertheless true that if the executive and legislative departments of the state had *acted* under a call of the kind for any substantial period of time, or if there had been a rather general yielding to the new order of things by the executive department, the courts would not interfere to restrain further action thereunder—on the ground of public acquiescence and public policy. *Miller* v. *Johnson*, 92 Ky. 589.

4. Analogies and supporting precedents to this asserted power of the people at large, etc.—are found in some four or five instances in the history of our country. In such cases there having been ineffectual attempts to get relief from a threatened evil by pursuing the prescribed methods, constitutional conventions were called in a manner *not warranted* by the existing constitution, and sometimes even *"in the very teeth"* of its very plainly worded technical requirements. And such conventions made the requisite changes or amendments and the latter were declared in force.

5. In such instances there happened to result no court

tests of the proceeding. For the *obvious necessity* of yielding to the new situation seemed to appeal to the common sense of the body politic, the people at large; and by a sort of common consent the new constitutions were generally recognized as in force, and thus they early became invulnerable from attack.

6. Two of such instances are the following:

The original Delaware constitution provided that there should be *no* change in vital provisions thereof, whether by amendment *or* convention revision, without a vote of at least five-sevenths of the members of the "Assembly" and seven-ninths of those of the "Council," which two houses constituted the legislature of the state.

The state needed a change in its Constitution in one or two respects and needed it very much. A number of efforts were made to get the requisite number of votes in the legislature for the proposed change, but they each failed.

Thereupon said body passed a resolution by a *majority vote*, reciting the failure of such efforts and the necessity for the change, etc., etc., and providing for the election of delegates to a state convention to be held for the purpose of revising the constitution, and making such changes.

Delegates were elected, the convention was called, it met and revised said instrument, making said vital changes referred to, and the new instrument was proclaimed and published and went into effect. Its validity was not *even questioned* and the people acted under it from the start. (See Jameson Const. Conv., 4th Ed., p. 596.)

A similar action was taken in 1850 in the State of Maryland.

The Constitution of 1776 of that state then in force,

Sec. 59, provided that neither the Form of Government nor the Bill of Rights nor any part thereof, should be altered, changed or abolished "unless a bill *so* to alter, change or abolish the same should pass the General Assembly and be published at least three months before a new election."

After violent contests between the friends and enemies of a proposed reform of the State Constitution, an act of the legislature—not to make the suggested changes but simply—*to call a convention* was finally passed in 1850. The result was the actual election of such a body and the adoption by it of the Constitution of 1851. (Jameson, p. 597.) The legislature never "*passed*" *any* of the measures so adopted.

The public evidently assumed that no provisions in the constitution could legally work to throw the state into anarchy and chaos, or rather that it had the right to save itself therefrom by adopting measures formally submitted to them—that is, to their electorate—by *their legally chosen legislature;* and the validity of the instrument was never questioned by any court proceedings.

7. The action of each of the States of Delaware and Maryland in these instances was the *legal expression* of the will of the *legal sovereigns* of such states.

And such legality is supported by and is based upon the following:

a. The state exists. With *no constitution whatever,* it would still exist.

Or, quoting from Mr. Bryce's work, "The American Commonwealth," (p. 464):

> "One could well imagine these several state governments working without fundamental instruments [constitutions] to control them. Each American state might now, if it so pleased, conduct its own

business and govern its citizens as a commonwealth at common law with a *sovereign* legislature whose statutes formed the highest expression of popular will."

b. In exigencies or crises which may directly involve the public health in general, or ultimately threaten the life of its people or the *very existence* of the state itself and preservation of its *government,* the rule that *"the majority controls," i. e.,* the majority of the electorate, is not only an *equitable* rule, but is a *legal* rule, *implied in the very existence of the state itself*—and this even though there be *express provisions* in the constitution of the state that a different rule, viz., a *two-thirds* or a *five-sixths* rule, for instance, should obtain when resort was to be had to legal action to meet the impending crisis. Hence,

c. All *extraordinary* or *unnatural* limitations in the constitution, which would *tend to give one generation the power to tie the hands of a succeeding one* or put limitation upon its *power* to change its fundamental law to meet any public crisis, should be construed *with the utmost strictness* and as *not applying* in full force to such overwhelming situation or exigencies *or* as *not exclusive.* And,

The rule must obtain that one generation has not the power to decree that a certain method shall be the only one by which such change shall be made.

d. The legislature is the natural, if not the only means through which the people speak or move to change their organization.

e. Such move must be made (or perhaps it should first be *attempted*) in the manner provided for by the constitution, and the legislature must [ordinarily should] keep within its limitations *unless* the health or peace and

tranquility of the state would be endangered by *delay, or by* [*further*] *attempts to follow* such method.

f. In such latter case the legislature *can* propose changes and this by a *majority vote.* If the *majority of vaters* (representing the *sovereign power*—the people themselves) vote affirmatively thereon, it will be *in fact the decree of sovereignty itself* and should be sustained by the courts, as warranted under the circumstances—as a measure *of necesity* adopted according to common law or universally accepted methods—as the only orderly and prompt way for *relief*—as essentially a *police measure* occasioned by a situation *unprovided for* [or rather *not met*] by the constitution—as a natural "last gasp." Such is not an act of "silent revolution" (as Jameson erroneously calls it, p. 597) but is rather the *orderly decree of a sane state organism,* that it will *not* throw itself into chaos and *be* "revolutionized."

In other words, *it is a legal principle.*

g. For the Assembly to refuse to speak in such a crisis, the courts to sustain, and the executive to execute, would be just about as logical and natural as for a man —though able to do so—to refuse to walk from the verge of a precipice, or as for one on the throes of death from suffocation to refuse to breathe pure air about him.

The heart of the state should be allowed free action to marshall and assert the last vestige of reserve power in a life and death struggle, as the heart of a man in the crisis of a fever which puts life in the balance.

h. There is a law above the Constitution—the law of sovereignty itself—as expressed by a *majority* of the electorate—the means of expression of the people at large.

Such action of sovereignty is essentially *legal* action, because *independent* of the Constitution and overruling

or amending—yes *displacing*—by its own force such portions, if any, of such instrument as might be in technical conflict with such action, and which would otherwise block emergency relief and bring disaster.

i. The law of the majority is a *just* rule, as is also the law of the scales. Occasionally a mere ounce might dominate the issue of tons in the balance. But the law of the scales is *just* in every case. On the other hand a foot-fall might start an avalanche—but no one has a right to take the step on the ground that it is only a step.

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8. In other words, the *state exists* independently of the constitution. The constitution exists *within* the state. Repeal the *entire* constitution and the state would still exist. (Bryce, "The American Commonwealth," *supra.*) And so existing, it could *act,* that is, by a *majority.* The ultimate theory is, *that one generation cannot tie the hands of another* and succeeding one, nor infringe upon the inalienable right of the people of *any* generation to change their fundamental government when it becomes necessary or *when a majority* of the people, *i. e.,* of the electorate, formally decide so to do. (Hoar, 13, 15.)

9. The rule of the *majority* is the rule of *ultimate* existence—**the life and death rule of a state.** Artificially created bodies—never act by two-thirds, three-fourths, four-fifths, or nine-tenths rule, unless under special acts—nor in any other proportions between that of *a majority* on the one hand and that of absolute *unanimity* on the other. (The latter is of course impossible.) There is no "God given ratio" or proportion that *inheres* as a *rule of action* in any numerous body, except the rule of the *majority.*

And the rule of the majority is the one rule which ob-

tains in a body without being stated. It is born with the body.

> "In every well regulated society, *the majority* has always claimed and exercised the right to govern the whole society, in the manner pointed out by the fundamental laws, and the minority are bound, whether they have assented or not, for the obvious reason that opposite wills cannot prevail at the same time, in the same society, on the same subject. 1 Tuck. Black. Com. Appx. 168; 9 Dane. Abr. 37; 1 Story. Const., §207." Bouvier Law Dic., "Majority Rule."

Police Power.

10. The doctrine of *police power* has been long established. In many instances statutes in apparent conflict with the letter of constitutions have been sustained under this doctrine, viz.: As being proper *police or defensive* measures under *extraordinary circumstances,* as measures of *necessity* for the public welfare.

11. And so it has often been said "a police law is *above* the constitution."

12. The *source* of this doctrine is *the power of sovereignty;* and, if constitutional provisions must yield to the action of sovereignty as expressed through *its creature,* the legislature, obviously those same provisions must yield to the *direct* action of *sovereignty itself.*

FURTHER SUGGESTIONS.

As just said, the Delaware and Maryland cases and the main affirmative proposition here submitted come under the well known emergency principle of *police power, i. e.,* its highest expression—the power of *sovereignty itself.*

To these two instances, Mr. Hoar in his late work

(Const. Conv., 1917, pp. 51-2) adds four similar ones, which arose in the States of Indiana, Georgia, Pennsylvania and Florida.

In referring to such action of the States of Delaware and Maryland in the U. S. Senate, Senator Bayard, defended their action as *thoroughly legal,* and as based upon the following political axioms:

> "First, that all powers of government rest ultimately in the *people at large;* secondly, that a *majority* of those who choose to act may organize a government; and thirdly, that *the right to change* is included in the *right to organize,* and may in like manner be exercised at any time *by a majority.*" He further said that any restriction upon the power of the majority at any time *to change* their form of government "is inconsistent with their own authority *to form* a government and at war with the very axiom from which their own power to act is derived."

So Reverdy Johnson, the great Maryland lawyer, also said in the U. S. Senate in 1864:

> "No man denies that the American principle is well settled, that all governments originate with the people, and may by like authority be abolished or modified; and that it is *not within the power* of the people, *even for themselves, to surrender this right,* much less to surrender it for those who are to succeed them. A provision, therefore, in the Constitution of any one of the United States, limitating the right of the people to abolish or modify it, *would be simply void.* And it was upon this ground alone that our Constitution of '76 (Maryland) was superseded by that of '51. * * * The Constitution of 1851, therefore, rests on the *inherent and inalienable American principle,* that every people have a right to change their government."

Subsequently, referring to this principle, he also said:

> "In its *nature* it is revolutionary, but, notwithstanding that, *it is a legal principle.*" (See Jameson, Const. Conv. 4th Ed. 596-7.)

The proceedings taken in the States of Delaware and Maryland were *legal proceedings* and supported by a two-fold logic, viz:

First. It could not have been intended by the state organizers that it should be disrupted and broken up; and hence any provision framed by them would be construed *to except* a case which *threatened* such a crises or result.

Secondly. In bringing the child of state into life, such parental generation (forming the Constitution) *had no power to decree its death;* and to such extent any incumbering provisions in the instrument which would threaten such a contingency would be fundamentally *inconsistent* with the *very act* of state formation, and void.

Between such construction of the constitution and the technical rule of following *the letter* of the constitution *in all cases* lies all that lies between order and chaos, sanity and insanity, existence and death. And it should therefore not be hard to choose between them.

And a matter of affecting *peace* or *war* affects, of necessity, *national life* and *national extinction and is the highest expression of the police power.*

There is a margin or area of jurisdiction and power lying between the constitution, on the one hand and anarchy and dissolution on the other—that of sovereignty itself.

Mr. Hoar says (p. 56):

> "The right of the people to change their government is not a right *under* the constitution, but it is rather a right *over* the constitution."

(*And if the people have a right to change their government they have a right to* SAVE *their government*).

"Or to quote from the Supreme Court of Virginia in an early decision:

'The convention of Virginia had not the shadow of a legal [this must mean *statutorily* legal] or *constitutional* form about it. It derived its existence and authority from a higher source; a power which *can supersed all law, and annul the constitution itself—namely, the people in their sovereign, unlimited, and unlimitable authority and capacity.*'"

"Or from the Supreme Court of New York:

'Neither the *calling of a convention*, nor the convention itself is a proceeding *under* the constitution. It is *over and beyond* the constitution.'"

On page 13 Mr. Hoar quotes from various initial constitutions of the states, the well-known and basal formulas to the effect that "*all government of right originates in the people,*" etc. "When any government shall be found inadequate or contrary to these purposes, *a majority of the community hath an indubitable, inalienable and indefeasible right to reform and alter* or abolish it in such manner as shall be judged most conducive to the public weal."

P. 15: "The whole people in their sovereign capacity acting through the forms of law at *a regular election may do what they will* with their own frame of government, even though *that frame of government does not expressly permit such action,* and *even though the frame of government attempts to prohibit such action.*"

By the term "popular conventions" used throughout Chapter IV as well as in the two preceding chapters, Mr. Hoar defines and includes the action of the people at large speaking *at a regular election, either* in calling a convention *or* in taking some *direct action* on fundamental matters.

(See also pp. 26, 28, Hoar.)

> "It is *not necessary* that a given action be *either* authorized *or* prohibited by the constitution; *it may be permitted* by not being mentioned at all, or *it may be valid because outside the power* of the constitution."

Mr. Hoar concludes his Chapter IV thus:

> "Thus we may conclude that although *popular conventions* (that is, those called without *express* authority of the existing constitution as well as those called *in violation* of the express provisions of such constitution), *are not constitutional, it does not necessarily follow from this that they are void,* although the Rhode Island Supreme Court so contends. *They are really authorized by a power above the Constitution, to wit: the sovereignty of the people, and hence are supra-constitutional and perfectly valid.*" (P. 57.)

The above texts and reasons applying to constitutional conventions, of necessity, apply in all their cardinal principles to the simpler or more direct process of submitting constitutional amendments, and to still more extreme and vital acts of sovereignty above or beyond the constitution as for instance declaring war or peace.

As a matter of fact the constitutional *convention* as an agency for constitutional *changes* has been habitually pushed beyond and far beyond its legitimate place in the development of American cinstitutional law. American states and publicists have acquired a sort of *convention habit.* The constitutional convention with wide open powers is *primarily* suited only to the *formation* of a state; and the natural process of development of an existing state is by *specific amendments* or *revisions* of its basal instrument.

As mere evidence that this thought is not given on

impulse and is the result of study and conviction, we beg to quote from a manual on the subject headed, "Chicago and the Constitution," prepared by the writer in connection with two other members of the Chicago bar, same 18 years ago (1902), a bound copy of which is in the Chicago Law Institute:

> "To say that after a republican state is formed and has existed a number of years, its organic system and fundamental law should be subject to be thrown aside for a new frame and declaration thereof, *or* that periodically conventions of the people should assemble to even *consider* such a step, is to condemn democracy itself and to assume that it is an experimental system of government.
>
> If there is much in the constitution which is illogical and cumbersome, it should be dropped or chopped off without bringing into the confusion and danger that which is vital. (P. 34.)"

• • • • •

Page 49:

> "No one who studies and reflects upon the question of constitutional conventions in America but will wonder why the people of so many states have resorted to them so frequently. These communities have acquired the *'convention habit.'* No better service could be done by a legal author than to show up to a 'going' state the unnaturalness of calling such conventions, and to help break this habit. But this must be the work of other hands than ours."

Hence, we say

1st. That the texts and principles supporting changes made through the indirect and burdensome and wasteful convention method, apply with all the greater force to the more *direct* and *specific* method of amendment.

2d. That submitting an immediate police power issue to the people must be equally valid, even though it displaces a contistutional clause and thereby or *pro tanto* amends such instrument.

The Act under which this prosecution is brought is repealed or is suspended.

Repeal of Statute—Express of By Necessary Implication.

The author (16 C. J. p. 69) says a penal law may, like any other statute be repealed by express or other necessary implication.

Effect of Repeal.

(C. J. 16, p. 70.)

The general rule is that if a penal statute is repealed without a saving clause, there can be no prosecution or punishment for a violation of it *before* the repeal. First U. S. Anonymous 1 Fed. Cas. 476; 1 Wash. C. C. 84; *Jordan* v. *S.*, 15 A. L. A. 746; *S.* v. *Mason*, 108th Ind. 48; *Keller* v. *S.*, 12 Md. 322; *C.* v. *McDonough*, 13 Allen 581; *C.* v. *M.*, 11 Pick. 350; *People* v. *Hiller*, 113th Mich. 109; *S.* v. *Long*, 78 N. C. 571; *S.* v. *Smith*, 56 Ore., 21; X. P. Maculean, 4th Porto Rico 119; *Greer* v. *S.*, 22 Tex. 588; *Halfin* v. *S.*, 5th Tex. Appeal 212; *Atto* v. *Commonwealth*, Second Ca. Cas. (4th Va.) 382; *State* v. *Campbell* 44 Wis. 529.

The author further says:

> "the repeal of an existing staute under which a proceeding is pending puts an end to the proceeding unless it is saved by a proper saving clause in the repealing statute and the penalty or punishment provided for under the repeal statute cannot thereafter be recovered or enforced *or the proceeding be further prosecuted. This is true even on a plea of guilty* and the fact that a defendant fails to accept at the trial, will not render a conviction valid." Citing authorities.)

Even when a statute is repealed after the accused has been convicted, judgment must be arrested and if an

appeal from a conviction is pending *when the statute* is repealed the judgment of conviction must be set aside and the indictment quashed even though argument has been heard, and the appeal dismissed.

Hicks v. *The U. S.*, 256 Federal page 707.

It appears from the evidence that Harry Hicks was convicted of operating a house of ill fame on the seventh day of December, 1918, in Louisville, Kentucky, within the district of a military cantonment designated by the Secretary of War in violation of an act of May 18, 1917. The Court in rendering an opinion said (page 710):

> "And so on November 11, 1918, Congress, knowing of his wishes, adopted the following joint resolution, viz:
>
> 'Resolved by the House of Representatives (the Senate concurring), that the two houses of Congress assemble in the hall of the House of Representatives on Monday, the 11th of November, 1918, at 1 o'clock in the afternoon, for the purpose of receiving such communication as the President of the United States shall be pleased to make to them.'"

Accordingly the two houses assembled in joint session in the hall of the House; the President appeared at the Speaker's seat, and gave to Congress information of the state of the Union in respect of the war it had declared on April 6, 1917. Having read to the Congress thus assembled the 34 terms stipulated in the armstice agreement entered into a few hours before and signed by the representatives of the German army, the President said:

> "The war thus comes to an end; for, having accepted these terms of armstice, it will be impossible for the German command to renew it.
>
> It is not now possible to assess the consequences of this great consummation. We know only that this tragical war, whose consuming flames swept from one nation to another until all the world was on fire, is at an end, and that it was the privilege of our own people to enter it at its most critical juncture in

such fashion and in such force as to contribute in a way of which we are all deeply proud to the great result. We know, too, that the object of the war is attained, the object upon which all free men had set their hearts, and attained with a sweeping completeness which even now we do not realize. Armed imperialism, such as the men conceived who were but yesterday the masters of Germany, is at an end, its illicit ambitions engulfed in black disaster." Congressional Record of November 11, 1918, and Official U. S. Bulletin, also of that date.

The question now to be decided is presented in this way: The acts charged in the indictment and claimed to constitute an offense against the United States were committed and done on December 7, 1918, at least 25 days after the President's communication to Congress had been officially and most conspicuously made declaring that the war "is at an end." Were the acts of the accused committed "during the present war" within the true meaning of that phrase as used in the section of the act upon which the government seeks to maintain the indictment and the conviction thereunder? Upon the proper answer to that question depends the authority of the court to inflict punishment upon him.

At the hearing it was urged on behalf of the United States that Congress alone can begin war, and consequently that Congress alone can terminate it. But that does not follow, for the Constitution, while in express terms giving Congress the sole power of declaring war, in no way so expressing itself as to give that body any authority itself to terminate it. And so in this instance, while Congress has not itself declared the war to be ended, in its presence the President—also the commander-in-chief of the army—did officially communicate to Congress the fact that it "is at end" upon the momentous occasion referred to and in the explicit terms we have given, and information of all the details of which

no doubt reached our entire population, including the person now under accusation, and all of whom might act upon the assumption that this official statement of the President was true.

The authoritative publications show that, while war is usually terminated by a treaty of peace, and that such treaty is the best evidence of such termination, history shows many instances in which wars were terminated without any treaty at all. Notably this must be so in domestic wars. So it is also where a complete conquest of the weaker nation leaves no one authorized to make a treaty. The public is oftentimes, perhaps generally, notified of treaties by official proclamation. But there is no prescribed form for such latter documents, and at last they are but official announcements of a state of fact. The President's official communication to Congress met all the conditions of an official proclamation, so far as such documents are designed for giving information. It was made on a notable occasion; it was made upon a theatre that attracted the attention of all the people of the United States, and indeed of the civilized world. The purpose of the President's oral message being to communicate information, it, if true, met the requirements of the question before us. Was that information accurate, or were the facts perverted? Does it now lie in the mouth of the government, in this persecution made made in its name, to insist that it was false, even if there is nothing like a technical estoppel?

Undoubtedly, if there be any doubt about it, a completely ratified treaty of peace is the best evidence of the termination of the war; but as we have said such a treaty is not essential to the actual ending of a war, as has many times been demonstrated. Indeed, there is no formal or ceremonious way agreed upon in international law or otherwise for ending a war. Circumstances gov-

ern such situations, and here as we have seen, they raise a most important, if not vital, question of fact, namely: Was the 7th day of December, 1918, "during the present war?"

For reasons more or less publicly known, no treaty of peace has yet been made; but it is claimed that actual war was nevertheless in fact ended last November, and the statement of the President, officially made and acclaimed on the 11th day of that month, and which met with quite universal acceptance by the people, is as effective in showing the fact of the actual termination of real war as would be the case with a treaty. In advance of a treaty, it is, of course, possible for the war to break out again; but, if it does not do so, then certainly it was in fact ended. If the announcement of the President was true and correct, then the 7th day of December, 1918, came after the war was at an end, and was not "during the present war," as that phrase is used in the statute under which this prosecution was begun. The accuracy of this proposition would seem to be obvious.

Again, the President's official statement was either true or it was mere rhetorical optimism. This court is by no means at liberty to yield to the latter alternative, for it is clearly of opinion, in view of current public history, that the President's statement was, in fact, correct when made, even if an agreed upon treaty of peace has been delayed in the making.

Every citizen of the United States, the defendant included, may well be presumed, first, to have been informed of the substance of the declaration made by the President, and, second, to have relied upon it as true. Probably all accepted it as correct, and rightfully acted upon it as being in fact true. Hostilities ceased, not a gun has since been fired, the demobilization of our troops is in active progress, and much acclaimed peace negotiations have

been under way. Under these circumstances every person in the country has the right to accept the President's official declaration as true, and to act upon it, and especially if it affected the question of whether certain acts were criminal or the reverse. Here most reprehensible conduct was made criminal only if committed "during the present war." When the war came to "an end," so did the thirteenth section of the Act of May 18, 1917, for, if the President's notable declaration was true and correct, the 7th of December, 1918, we repeat, was not "during the present war." That date, in those circumstances, was after that statute had ceased to be a law of the United States, in which case the acts alleged in the indictment could only be punished under the law of the state.

After it had declared war, Congress found it necessary to enact much war legislation, and provided in each act for a more or less extended period for the operation of its provisions, and doubtless undertook to make the length of that existence depend upon what it deemed the necessities of the subject-matter—the limitation fixed in the thirteenth section of the Act of May 18, 1917, presumably being based upon the Tenth Amendment of the Constitution. Possibly the most restricted continuance of such legislation was that fixed in the section involved in this case. A more detailed examination and search than is now deemed at all necessary might show in the so-called war legislation a great variety of phraseology used in fixing the circumstances and contingencies upon which its operation would come to an end; but all the while, and in respect to all such legislation, it must be presumed that Congress expressed itself exactly as it preferred in respect to each subject-matter. The extremes of this would probably be shown on the one hand in the phrase "during the present war," used in section 13 of the Act of May 18, 1917, and on the other in the quite intensive

phraseology of clause 4 of section 1 of the Act entitled "An Act to enable the Secretary of Agriculture to carry out during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the previous act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes" approved November 21, 1918 (40 Stats. 1046, c. 212).

To summarize: The Act of May 18, 1917, made criminal certain immoral conduct if committed "during the present war"—of course meaning the war with Germany, which a few weeks before, had been declared by Congress. The limitation distinctly specified by Congress for the continued operation of this criminal legislation was expressed in the words just stated. This limit thus fixed was not the making of any treaty of peace, nor its ratification, nor the mustering out of the troops making up our army. In fixing the time of continued operation of the act Congress used the words "during present war." This does not appear to be a case of technicalities, but for facts. If the war in fact had ended on November 11, 1918, it did not continue until the following December 7th. We know the war began on April 6, 1917. When did it end? On November 11th, as we have stated, the President communicated to Congress the express information that this "tragical war * * * thus at an end." This status, then ascertained and communicated to Congress by the chief of the executive and of the military service of the United States government, should, we think, be accepted as accurate and final by the court in this case.

In our view the statement by the President on November 11, 1918, must at the very least be received and treated as *prima facie* true in the present status of this case, though facts may possibly develop to show the contrary. In view of such possible developments of fact, we have

concluded it to be best to overrule the defendant's motion in arrest of judgment, but to sustain his motion for a new trial. If at the next term a new trial shall be had, an instructed verdict of not guilty can be asked, and the same might be given, if nothing then appeared to demonstrate the inaccuracy of the President's statement. This remark, however, should not be construed as reach any *ex post facto* legislation that may in the meantime be enacted.

Entries will be made accordingly.

Federal Case No. 475 Anonymous.

In this case the defendant was indicted charged with perjury before Commissioners of Bankrupts. The hearing was before Washington, Circuit Justice, and Peters, District Judge. Judge Washington delivering the opinion of the Court said:

> "The offense must not only come within the terms of such law, but the law itself must, at the time, be subsisting. It is a clear rule, that if a statute create an offense, and is then repealed, no prosecution can be instituted for any offense committed against the statute previous to its repeal. The end of punishment is not only to correct the offender, but to deter others from committing like offenses. But, if the Legislature has ceased to consider the act in the light of an offense those purposes are no longer to be answered, and punishment is then unnecessary."

The Court after reviewing the Repealing Act of December, 1803, directed the jury to find the defendant not guilty. The District Attorney in the above case contended that the Repealing Act did not apply for the reason that:

> "the doctrine applies only to cases of treason and felony." (Citing 2 Hawk (P. C.) 87; 1 Hawk (P. C.) 306; 1 Hale (P. C.) 291, 525; 2 Hale (P. C. 190.) With the limitation thus contended for the Court did not agree.

In *Keller* v. *The State,* 12th Md. 222, the defendant was indicted under an act to regulate the issuing of licenses to ordinary innkeepers and traders and was convicted, from which an appeal was taken and the Court said, pending appeal:

> "If the record is properly before us the motion must be granted. It is well settled, that a party cannot be convicted after the law under which he may be prosecuted has been repealed, although the offense may have been committed before the repeal." (Citing authorities.)
>
> "The same principle applies where the law is repealed or *expires pending an appeal or writ of error from the judgment of an inferior court.* It has frequently been recognized in admiralty cases where property was seized and condemned on the ground that the repeal of a law before the decision in the court above removed the penalty, and that the court in disposing of the appeal or writ of error, must decide according to existing laws at the time of the final judgment." (Citing authorities.)
>
> "Chief Justice Marshall states the doctrine generally, and not as applicable only to condemnations in admiralty. There seems to be no reason for saying that it shall not govern in other cases of penalty or fine when pending causes are not accepted in the repealing act and we may consider that the Court of Appeals so regarded this doctrine, for in the case of *State use of Washington County* v. *the Railroad Company,* 12th G. & J. 437, where the defendant claimed the benefit of an assembly releasing a penalty, the court relied upon what was said in 5 Cranch, 283, namely: 'The court is therefore of the opinion that the cause is to be considered as if no sentence had been pronounced and if no sentence had been pronounced, it has been long settled on general principles, that after the *expiration* or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.' The judgment in a criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal of a record to a Superior Court. If this were so there

would be no use in making the appeal or suing out of a writ of error. To be sure it does not operate to stay the execution of the sentence, if the state chooses to proceed on the judgment; but, when deciding in favor of the accused, the reversal will operate so far as possible for his relief. If he be undergoing punishment according to the sentence pronounced, he will be discharged as in the cases of Black 2nd Md. Repts. 376; and Cochran, 6 Md. Repts. 400, and so if the law be repealed pending the appeal or writ of error the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment." Citing Chief Justice Marshall in 1 Cranch, 110, to the effect that, "if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." See also 3 Howard 534, where the Chief Justice said, that, "the repeal of a law imposing a penalty is of itself a remission of the penalty."

In *State* v. *Campbell,* 44 Wisconsin, p. 533-536:

"Chapter 340 contains no saving clause authorizing a prosecution under the old law for offenses already committed. There is therefore no law which will authorize or sustain a judgment on the verdict. It is true, by this construction all offenses committed by public officers under the revised statutes of 1858, which were not prosecuted to judgment prior to the new law taking effect, will go unpunished. *But this consequence must rest upon the legislature and not on the courts.* The legislature could easily have avoided such a result by enacting a proper saving clause in Chapter 340. As the law now stands we must hold that there is no statute under which the defendant can be punished. We may deplore this but it is beyond our power to help it without a violation of well settled principles of law."

In *Commonwealth* v. *McDonough,* 95 Mass., p. 581. A statute imposed for an offense a penalty of a fine and imprisonment. A subsequent statute was enacted which contained no saving clause as to offenses already com-

mitted, and imposed a different penalty for the same offense and the Court held that:

> "After the enactment of such subsequent statute, one who committed an offense before its enactment cannot be punished even by being sentenced to pay the minimum fine fixed thereby."

The Court said:

> "The penalty was repealed by the statute of 1866 without a saving clause and we must presume that the repeal was made by the legislature in view of the principles stated in *Commonwealth* v. *Marshall*, above cited, that if the law ceases to operate by its own limitation or by a repeal at any time before, no judgment can be given. We must also presume that the legislature had in view the principle of criminal law so important and so well established that penal statutes are to be construed strictly."

In *State* v. *Mason*, 108 Ind. 48, Mason, a County Treasurer, was indicted on the 20th of May, 1885, for embezzlement stating that his term of office was from 1778 to 1882. A demurrer to the indictment was sustained and an appeal prayed by the State. It was contended by the defendants that the act of 1881 repealed the act under which the defendant committed the offense complained of. The Court said, page 51:

> "While the law does not favor the repeal of statutes by implication, yet it is well settled that when a new statute covers the whole subject-matter of an older statute, and provides penalties for offenses enumerated in the older law, the former or older law is repealed by implication." (Citing authorities.)

In *Jordan* v. *State*, 15 Ala. 746, the defendant was indicted under an act of 1846 which provided that a slave merchant should procure a license from the County Clerk and pay $5.00 for each slave he offered for sale. The defendant upon the trial requested the Court to instruct the jury that this act was repealed by an act of 1848,

which was refused and the reviewing court held that as the Act of 1848 provided for a different penalty, that there was a plain repugnance that both acts could not stand together and the former by implication was repealed and said:

> "He has not violated the Act of 1848 and the Act of 1846 is no longer in existence nor is there and provision in 1848 to punish those who have offended against the Act of 1846. As the act under which the defendant was indicted was repealed before his trial, he could not be convicted. The Circuit Court erred in not giving the charge requested and the judgment must be reversed, and the cause remanded."

In *State* v. *Lang*, 78th N. C. 571, the defendant was indicted under a statute prohibiting a tenant from removing crops without the lessor's consent. It was contended that the Act of March 19, 1873, was repealed by that of March 12, 1877. The Court said:

> "It is well settled that the repeal of a statute *pending a prosecution* for an offense created under it, arrests the proceeding and withdraws *all authority to pronounce judgment even after conviction* and it is equally clear that no aid can be derived from the last enactment which is necessarily prospective only in its operation, and under the Constitution cannot apply to antecedent acts."

The motion in arrest of judgment was allowed.

In *Hiller* v. *The People*, 113 Mich. pp. 209-211, the statute provided a penalty for the willful neglect of an executor or administrator to deliver over to his successor property held in trust. This was amended increasing the time for compliance with the acts and increasing the maximum punishment. The Court held that this repealed the former act and said:

> "We understand the rule to be, in criminal cases, in the absence of a saving clause that where the penalty is altered in degree, but not in kind, by increasing the punishment which may be imposed, the ef-

fect of enacting the increased penalty is to repeal the earlier provision." (Citing authorities.) "The repeal or expiration of a statute imposing a penalty or forfeiture will prevent *any prosecution, trial or judgment for any offense committed against it while it was in force,* unless the contrary is provided in the same or some other existing statute." (Citing authorities.)

In *Commonwealth* v. *Marshall,* 28th Mass. 350-351, the defendants were charged with the commission of an offense by disinterring a dead body on *February* 20, 1831, in violation of the statute of March 2, 1815, which was repealed by a statute of *February* 28, 1831, without a saving clause. The Court said:

"It is clear that there can be no legal conviction for an offense, unless the act be contrary to law at the time it is committed; *nor can there be a judgment, unless the law is in force* at the time of the indictment *and judgment.* If the law ceases to operate by its own limitation, or by a repeal at any time before judgment, *no judgment can be given.* Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force, as all pending prosecutions, and often as to all violations of the existing law already committed."

In *State* v. *Smith,* 56 Ore. Rpts., p. 21. In this the Court said:

"We are therefore confronted with the anomalous situation of the accused having been tried and convicted of an offense committed while Section 1768 of the Code was in force, but which was, at the time of the trial and sentence, displaced by that part of the Act of 1909 above quoted. Yet the person convicted was not sentenced under the provisions of either act, but under the Act of 1905 (Section 1, p. 318, Gen. Laws 1905), which manifestly does not apply to crimes of this class; for the right to impose the sentence there provided is expressly limited to cases where the penalty may not exceed 20 years, while

the maximum penalty fixed by law for the offense of which defendant was convicted, in force when the sentence was imposed, was imprisonment for life. If common law offenses were recognized in this state, the legal difficulties presented would be easy of solution. For example: In Connecticut, in 1798, a case analogous to the one at bar was before the Appellate Court, in which the defendant was found guilty of burglary under an old statute, which at the time of his conviction and sentence had been repealed. A motion was made in arrest of judgment, but it was held that, as burglary was an offense at common law, a statute declaring the punishment was enforcible, notwithstanding the statute under which the crime was committed had been repealed."

In *Halfin* v. *State*, 5 Tex. Crim. Appls., the defendant was prosecuted by information, for violating an Act of 1866 prohibiting the sale or exchange of intoxicating liquor. It was insisted by the defendants that since the prosecution commenced, the county which had previously adopted the law prohibiting the sale of liquor, by election decided that the law should no longer be enforced and that the effect of this election was to relieve from prosecution and punishment those who had, prior thereto, been accused of violating its provisions. The Court said:

"The repeal of a penal law, when the repealing statute substitutes no other penalty, will be held to exempt from punishment all persons who have offended against the provisions of said repealed law, unless it be declared otherwise in the repealing statute." (Citing authorities.)

There is no general saving Act in the United States Statutes applying to the Law under consideration. The general saving Act in the Statutes of the United States (Revised Penal Code) applies only to the codified Penal Laws, which sections are as follows:

Section 342: The repeal of existing laws or modifications thereof embraced in this title shall not effect any

act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause prior to said repeal or modifications, but all liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made.

Section 343: All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, or changed, modified, or repealed by this title, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

The above sections of the Federal Statutes 1909.

They clearly apply *only* to acts enumerated in the Codified Laws.

Respectfully submitted,

SEYMOUR STEDMAN,

Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

VICTOR L. BERGER ET AL.
v.
THE UNITED STATES OF AMERICA. | No. 460.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and set it for hearing on December 6 next.

The plaintiffs in error, Victor L. Berger and others, were convicted in the district court of a violation of the espionage act. The case came on for hearing before Judge Kenesaw M. Landis, and the plaintiffs in error presented an affidavit of prejudice, objecting to a hearing of the case before Judge Landis. Judge Landis overruled the motion for a hearing before another judge and presided at the trial, the result being a conviction. The case has now been heard by the Circuit Court of Appeals

and that court has certified to this court certain questions. These questions relate to the competency of Judge Landis to preside at the trial after the presentation of the affidavit of prejudice.

The case is one of importance and great public interest, one of the plaintiffs in error, Victor L. Berger, having been denied a seat in Congress, to which he had been twice elected, once before and once after his conviction. The matter to be determined is one about which there is some confusion in the rulings of the lower courts and which has not been decided by this court. It is, therefore, a matter of importance, both to the public and to the plaintiffs in error, that the questions certified be speedily determined in order that the Circuit Court of Appeals may promptly determine whether the conviction obtained in the District Court was proper. It is also of importance to the Government to have an early ruling for the guidance of district judges in similar cases.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

NOVEMBER, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

VICTOR L. BERGER ET AL.
v.
THE UNITED STATES OF AMERICA. | No. 460.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case is here on certificate from the Circuit Court of Appeals presenting alone the question as to whether District Judge Landis was in error in presiding on the trial of the case after the filing of an affidavit of prejudice.

The Certificate.

It appears from the certificate that the plaintiffs in error were indicted on February 2, 1918, charged with violating certain sections of the espionage act (40 Stat., c. 30, p. 217). They demurred to the indictment and the demurrer was heard on October 25, 1918, and overruled by Judge Evan A. Evans, one of the circuit judges

for the seventh judicial circuit, who was then sitting in the district court. On November 12, 1918, the plaintiffs in error filed in the district court an affidavit of prejudice, challenging the right of Judge Kenesaw M. Landis, one of the two judges of the district court, to preside in the case. Judge Landis overruled the application for a change of venue and presided at the trial at which the plaintiffs in error were convicted. The affidavit of prejudice was as follows:

> To the honorable judges of the United States District Court of the Northern District of Illinois, Eastern Division:
>
> Your petitioners, Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker, and William F. Kruse, jointly and respectively, respectfully represent that they are defendants in the above-entitled cause, wherein they are charged with the crime of conspiracy; that his honor Judge Kenesaw Mountain Landis, judge of the United States district court for said district, is presiding over the trial of criminal cases in said court; that the above-entitled cause was heretofore presided over by Judge Evan Evans, a judge of the United States circuit, before whom a demurrer in the above-entitled cause was presented and argued and before whom a plea of former acquittal was filed by the defendant Adolph Germer; that said demurrer and plea were ruled upon adverse to these defendants on or about October 26, 1918.

Your petitioners further represent that they presumed that the trial of said cause would probably be presided over by said judge who heard said motion, but that they have been informed within the last week that said cause was on the calendar of and to be presided over by said Judge Kenesaw Mountain Landis unless otherwise provided by the court in accordance with section 21 of the Judicial Code of the United States.

Your petitioners further represent that they jointly and severally verily believe that His Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to wit: Victor L. Berger, William F. Kruse, and Adolph Germer, defendants in this cause and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a State or Province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." And referring

to a German who was charged with stating that "Germany had money and plenty of men, and wait and see what she is going to do to the United States," Judge Landis said in substance: "One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safe blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good

soldier, and as between him and this defendant, I prefer the safe blower."

These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, national secretary of the Socialist Party; William F. Kruse, editor of the Young Socialists Magazine, a Socialist publication; and J. Louis Engdahl—disapproved the entrance of the United States into this war.

Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States, and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries; but verily believe because they are impleaded with Berger, Kruse, and Germer that they as well as Berger, Germer, and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said Berger, Germer, and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case.

Wherefore your petitioners pray that proper proceedings be had in accordance with either section 20 or section 23 of said Judicial Code of the United States, so that the senior Circuit Judge of the seventh circuit in which said Northern District of Illinois, Eastern Division, is located shall

assign a district judge to said circuit other than the said Kenesaw Mountain Landis to preside at the trial of the above-entitled cause.

This was signed and sworn to by each of the plaintiffs in error, the oath being "that they are each respectively familiar with the contents of said petition, and that the matters and things therein contained are true in substance and in fact, except such matters and things as are set forth on information and belief, and as to such matters and things said affiants believe them to be true." Seymour Stedman, attorney for defendants, certifies that "said petition and application for change of venue is made in good faith."

When the application came before Judge Landis there was some discussion, and it appears from the certificate that Mr. Johnson, one of the attorneys appearing for the plaintiffs in error, stated, in answer to an inquiry from the court, that the language imputed by the affidavit to Judge Landis was that used by him in the case of *United States* v. *Weissensel* after a verdict and upon the occasion of the imposition of sentence. The court, after overruling the application, permitted a stenographic report of what occurred in that case to be filed. From this it appears that the affidavit does not at all accurately quote what the judge said. The affidavit quotes him as saying: "One must have a very judicial mind, indeed, not to be

prejudiced against the German-Americans in this country." The stenographic report shows that what he said was: "A man in this country now, in 1918, that has such a judicial mind that he can express affection for this thing called the Kaiser, and his darling people, he is a little bit too judicial minded for his safety in this country." The affidavit quotes him as saying: "You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty." What the stenographic report says he said was: "It is just this type of man that has branded almost the whole German-American population. One German-American like this fellow, going about talking this stuff, does more damage to his people, and by his people I mean born in Germany and after they come here, than thousands of these people can overcome by being good and loyal citizens over here. * * * I say he is an ideal illustration of the occasional American of German birth whose conduct has done so much to damn the whole ten million in America." All this was said after Weissensel had been convicted and when the court was passing on the question of his punishment. The entire stenographic report shows that what the judge said was not directed at the German people in general, but at those Germans who had done what the jury

found the defendant in that case had done. The questions submitted by the court are:

1. Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge?

2. Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

3. Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

Statute Involved.

The statute involved is section 21 of the Judicial Code, which is as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or

prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. * * *

BRIEF.

The law authorizing the filing of an affidavit of prejudice was enacted for the first time when the Judicial Code was adopted. Just what its effect is has not been determined by this court. One thing would seem, however, to be clear at the outset: Unless the affidavit complies with the requirements of section 21 of the Judicial Code, it can have no effect and the judge against whom it is directed can properly proceed with the trial.

I.

Decisions of this Court.

There are only two cases in which this court has referred to the statute in question, and these cases throw but little light on the present controversy. In the case of *Glasgow* v. *Moyer*, 225 U. S. 420, Glasgow sought, through a habeas corpus proceeding, to be released from the penitentiary upon the ground, among other things, that a dis-

trict judge had presided at the trial at which he was convicted notwithstanding the fact that a proper affidavit of prejudice had been filed. The court, however, held that, if the judge was in error in proceeding with the trial, this was a matter which could be reviewed on writ of error, and hence was not properly triable in a habeas corpus proceeding.

In *Ex parte American Steel Barrel Company*, 230 U. S. 35, 45, an affidavit of prejudice was filed against Judge Chatfield in a bankruptcy proceeding. The judge declined to act further in the case, and Judge Mayer was assigned to take his place. The acts of Judge Mayer were challenged upon the ground that the affidavit of prejudice was not filed in time and was not sufficient in law, and that, therefore, Judge Chatfield should have presided, and the acts of Judge Mayer were void. The court, however, disposed of the question thus:

> We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that "personal bias or prejudice" existed. If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry* v. *Speer*, 201 Fed.

> Rep. 869; *Ex parte Fairbank Co.*, 194 Fed. Rep. 978; *Ex parte Glasgow*, 195 Fed. Rep. 780, affirmed by this court in *Glasgow* v. *Moyer*, 225 U. S. 420. But this is not what happened. Judge Chatfield held that the affidavit was sufficient in law to make it his duty to proceed no further.

These decisions establish that when a judge holds that an affidavit of prejudice is not filed in time, or is insufficient in law, or, for any reason, overrules the application and continues to proceed in the case, his action in so doing is subject to review and, if improper, to reversal by an appellate court, but that unless his acts are so reviewed and reversed they are not void.

Moreover, in *Ex parte American Steel Barrel Company, supra*, the court very clearly indicates what must appear before the judge can be said to be disqualified to proceed. It was said:

> The basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse

rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term. (Id., 43–44.)

II.

Decisions of Other Courts.

The question is, What are the rights and duties of a judge when an affidavit of this kind is filed? Plainly, if it is not filed within 10 days before the beginning of the term, and no effort is made to explain why it was not filed earlier, he can disregard it, because the statute, in express terms, requires either that it be filed that long before the term or that the delay be explained. But if it is not filed within the time prescribed, and it is attempted to excuse the delay, is he authorized to determine whether the excuse is sufficient, or must he accept any excuse that is offered? If the affidavit, while charging prejudice or bias, does not attempt to state any facts or any reasons for the belief that such bias or prejudice exists, clearly he may disregard it. But if it does state facts and reasons upon which the belief is based, is he authorized to deter-

mine their sufficiency, or must he treat as sufficient any facts or reasons, however absurd, that may be stated? If the statements of facts made are, on their face, sufficient, must he in all cases accept them as true? If, for instance, a defendant's affidavit states that he had been previously tried before the same judge and punishment out of all proportion to his offense and out of all reason imposed on him, would the judge be bound to accept this statement as true, although the records of his own court showed that in the case referred to the defendant had not been convicted but that the judge had directed a verdict in his favor.

Again, assuming that the allegation that bias or prejudice exists may be made as a matter of belief, is it sufficient to state the supporting facts on information and belief? If the affidavit states merely that it is rumored that the judge has done or said so and so, is the judge bound to treat this as a statement of fact within the meaning of the statute? Or does the statute require that the belief in the existence of bias or prejudice must be supported by the statement of facts to which the defendant can swear of his own knowledge? These are some of the questions that must be considered in interpreting this statute. Undoubtedly the statute was not intended to give the defendant practically a peremptory challenge. Just as undoubtedly the judge is charged with some duty to examine and consider the application before

acting upon it. The question is, what matters is he authorized to consider and determine?

In *Henry* v. *Speer,* 201 Fed. 869, the Circuit Court of Appeals for the Fifth Circuit, after very careful consideration, said, at page 872:

> Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.

Apparently, that court took the view that the judge should determine for himself whether the facts stated were, if true, sufficient in law to justify the belief that prejudice or bias existed, and that if he concluded that the affidavit on its face was sufficient he should not pass upon its truth or falsity. In that case the affidavit had averred a belief that prejudice or bias existed on the part of Judge Speer, and the supporting fact stated, not on information or belief, but as a fact, was that Judge Speer had published an article or statement which indicated "bias and prejudice of the said judge against deponent's right to recover." Judge Speer

held the affidavit insufficient, and in reviewing his action the Court of Appeals said:

> In the enactment of section 21 the plain purpose of the Congress was to afford a method of relief through which a party to a suit may avoid trial before a judge having a *personal* bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against the suitor making the affidavit or in favor of his opponent. The statute qualifies the words bias and prejudice by the single word "personal." The deponent in the affidavit filed below failed to use the qualifying word "personal" in making oath to the existence of bias or prejudice on the part of the judge before whom the case was to be tried. It is contended that the use of the word in the statute, in view of the context, is merely cumulative and tautological; that it may be omitted from the affidavit, and still the quality of bias or prejudice will be revealed to be personal. But the statute requires the use of the word, and it may not be avoided. Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions. The affidavit filed below illustrates the necessity for such compliance. Its perusal reveals the facts and reasons ad-

> vanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and "against deponent's right to recover." Section 21 is not intended to afford relief against this situation.

The court further held that Judge Speer had correctly ruled that the affidavit was insufficient and committed no error in continuing to preside in the case.

It would seem, upon reason and common sense, that the correctness of this decision, as far as it goes, can not be seriously questioned. If the affidavit does not aver personal bias or prejudice or does not state facts which tend in any way to show such personal bias or prejudice, although they may show a prejudgment of the case and a consequent prejudice against the rights sought to be asserted, the statute has not been complied with and the judge may rightfully disregard the affidavit. If this decision is not sound, then all that is required to remove a judge is that a party shall file an affidavit charging personal bias or prejudice and stating as his reason for believing that such bias or prejudice exists any facts he chooses, however unrelated either to himself or the judge. In other words, to give the judge any less discretion in the matter than is given him by the decision quoted above would be, in effect, to give a party to a suit a peremptory challenge.

In the case referred to above the court seems to assume that the trial judge should accept the statements of the affidavit as true. That question, however, was not before the court. The facts averred were statements made in a published article which were not denied. Judge Speer had accepted them as true. And nothing in the case required the court to go further than it did go in holding that, even assuming the statements of facts to be true, the affidavit was insufficient and the action of the judge in disregarding it proper. That case can not, then, be said to have determined that the judge must, in every case and under all circumstances, accept as true every statement made in the affidavit.

In the case of *Ex parte N. K. Fairbank Company*, 194 Fed. 978, Judge Jones, in the District Court for Middle Alabama, refusing to hold himself disqualified, held that the mere filing of an affidavit of prejudice under section 21 does not disqualify a judge where the facts stated of themselves show, as a matter of law, that no prejudice exists. He went further, however, and held that if that section be construed literally to mean that the mere filing of such affidavit is sufficient to disqualify the judge without a hearing to determine whether the facts stated are true or show disqualifications, it would be unconstitutional as depriving the courts of judicial power and vesting the same in the litigants to that extent. In support of this conclusion he delivered an elaborate and learned

opinion, to which the attention of the court is invited. His idea was that the judge must pass on this application as he would on any other matter arising in the course of the case, his action in that regard being subject to review as any other matters, and that the objecting party's rights were sufficiently protected because, if he committed an error, his action could be reversed. He does not question the power of Congress, when a judge is challenged for personal prejudice or bias, to require that he shall proceed no further until the truth of the challenge is investigated and determined by another judge; but he does question the power of Congress to enact that the affidavit of a suitor, whether true or not, shall automatically work a disqualification of the judge. What he says, after a review of the authorities on this question, is worthy of consideration. It is this:

> The inherent powers of courts and judges set up to administer the judicial power of the United States have always been held to include ample authority to protect them against insult and assault, whether by physical violence or contumelious behavior and words, and it has been held time and time again that the possession of such powers is essential to their independence and well-being. In a petition giving facts to show personal bias or prejudice, an unscrupulous litigant, if his passions or those of his attorney permit the one to swear, and the other to certify that he swears in good faith, may will-

fully and falsely charge the presiding judge with high crimes and misdemeanors or other disreputable things without a semblance of truth or decent excuse for doing so. Shackled by this statute, if it be valid, an innocent judge is compelled to enter the slanders upon the records of the court and slink from the discharge of his duty in the particular case as though he were already convicted of crime. If the courts are to last, if they are to perform their functions under the Constitution and exercise the powers committed to them, no such summary way of dealing with, and it may be destroying, a judge can have the force of law. While any conscientious judge would gladly welcome any effort on constitutional lines to remedy the evils at which this statute is aimed, and would feel a sense of relief if the statute were so altered as to conform to the Constitution and thus free him from the embarrassments resulting under the present statute, yet when this is attempted by a statute which outlaws the judge and drives him from the bench in the particular case on the allegations of an affidavit, whether true or false, which condemn him without any defense or hearing of any kind as an unfaithful and incompetent judge, a court which is mindful of its obligation to the Constitution and the sacredness of its oath of office must decline to give the statute any effect and treat it as a nullity. If the judge is suspected, whether rightfully of wrongfully, of bias or prejudice, the ex-

> istence of that bias or prejudice must be ascertained by some judicial authority, and the judge must not be left defenseless against such assaults because a litigant in his court makes an ex parte affidavit. If the matter be referred to some other judge, all the rights of the litigant are preserved and also the dignity and honor of the courts. This is not the case under the present statute. It makes the affidavit maker, in effect, lawmaker, judge, and executioner. The judge may be entirely blameless, but he is not permitted to defend himself or show the falsity of the accusation, and thus is branded for all time on the records of his court as an unworthy judge. (Id., pp. 1000–1001.)

In *Ex parte Glasgow,* 195 Fed. 780, which was affirmed in *Glasgow* v. *Moyer, supra,* it was held that after a conviction the writ of habeas corpus would not lie, upon the ground that the trial judge should have vacated the bench upon the filing of an affidavit of prejudice, for the reason that his action, in that regard, was subject to review on writ of error. Thus, it makes it plain that the mere filing of the petition does not automatically remove the judge, but that he has some judicial function to discharge in passing upon the application. In the *Glasgow* case, the affidavit of prejudice was not filed until after a verdict of guilty and when motions in arrest of judgment and for a new trial were about to be heard. In the petition for habeas corpus it was

insisted that, since the trial judge was required by the statute to proceed no further after the filing of the affidavit, he could not even certify a bill of exceptions after he had wrongfully proceeded with the trial, and hence his action could not be reviewed by writ of error. In that case the district judge had held that the affidavit of prejudice had been filed too late, and hence must be disregarded. Replying to the contention made in the petition for habeas corpus, Judge Newman said:

> The question is, first, whether or not the alleged error of the judge in holding this affidavit ineffectual to stop the case at the stage it had reached, under all the circumstances, could have been taken up for review to the Circuit Court of Appeals for the Third Circuit. Counsel urges that it could not, because, as he states, there was no judge to certify the bill of exceptions or from whose judgment and action the writ of error could have been taken. The position, as I understand it, is that the moment the affidavit was filed the judge became disqualified absolutely and any act of his thereafter, in the case, would have been void. I am unable to agree with counsel about this. There does not seem to me to be the slightest difficulty where the suggestion is made under this section of the new Judicial Code, or otherwise, that a judge is disqualified and he overrules it, and proceeds to try the case or to conclude it if

> he is engaged in trying it, so far as that action can be taken to the proper appellate court for review, the judge who tries the case can certify to what occurred on the trial for the purpose of allowing the same to be so reviewed. (Id., p. 782.)

In the case of *In re Equitable Trust Company of New York*, 232 Fed. 836, a petition for the writ of mandamus was filed in the Circuit Court of Appeals for the Ninth Circuit to require a district judge to proceed no further in a case in which an affidavit of prejudice had been filed, and the court held that, since the action of the district judge, in that regard, was subject to review upon writ of error, mandamus would not lie.

It is believed that the foregoing are all the cases in which the Federal courts have undertaken to construe section 21 of the Judicial Code. There is unanimity in holding—

> (1) That upon the filing of an affidavit of prejudice the trial judge must determine whether it is filed in time and whether its statements are sufficient in law to comply with the statute.
>
> (2) That his action in this regard is judicial and is subject to review upon writ of error or appeal, but not subject to collateral attack as being void.
>
> (3) That section 21 of the Judicial Code applies only to those cases in which the affiant can state facts which tend to show personal prejudice or bias.

(4) That the personal prejudice or bias which will disqualify a judge is prejudice or bias personal to the litigants and not merely arising out of a prejudgment of their case.

Only one district judge has considered the question as to whether the judge may, under any circumstances, consider the truth or falsity of the statements made, and that judge held that, if, under all circumstances, the judge must retire if the affidavit is filed in time and contains statements of fact which, if true, tend to show personal prejudice or bias, the act is unconstitutional.

III.

The Judge Presiding When the Affidavit of Prejudice is Presented Must Pass Upon its Sufficiency.

Bias or prejudice is a state of mind. It is something which can be proved and established, not by direct testimony, but by proving declarations, conduct, and facts, which may indicate motives and evidence feeling, and thus throw light on the state of mind. When bias or prejudice is charged, in whatever language the charge is couched, it can, in the very nature of things, be nothing more than the expression of the opinion of the person preferring it, which has been formed by a consideration of the words and conduct of the party against whom the charge is made. Very naturally, therefore, Congress was not willing that a judge should be regarded as disqualified when-

ever any litigant should be willing, under oath, to express the opinion that he was biased or prejudiced. Otherwise, section 21 would simply have provided for an affidavit charging bias and prejudice without more. But it goes further and expressly requires that the affidavit "shall state the facts and the reasons for the belief that such bias or prejudice exists." Congress thus recognized that the charge of prejudice was nothing more than the expression of the belief that it existed. Whether the judge is disqualified depends, then, not upon the mere fact that prejudice has been charged, but upon the facts which it is alleged tend to show such prejudice. Unless the facts so alleged were intended to be considered and decided, by some authority, to have a tendency to prove prejudice, the requirement that they should be stated was an idle ceremony. The object was, of course, to require the statement of facts which would justify the belief in the existence of prejudice.

If, however, these facts are not to be judicially scrutinized for the purpose of determining whether they justify the alleged belief, no possible purpose is served by inserting them in the affidavit. By requiring them to be stated, Congress has evidenced a clear purpose that the mere charge of prejudice shall not be sufficient. It must have had some purpose in requiring the facts upon which the belief of prejudice was based to

be stated. There could have been no purpose in requiring this unless it was intended that the facts stated should be passed on judicially by somebody, so as to test the justification for the belief of prejudice. Congress might, as suggested in the opinion of Judge Jones, *supra*, have provided that, upon the filing of such an affidavit, some other district judge should pass on the sufficiency of the facts stated. It did not do so. It might have required that the petition be certified to the presiding circuit judge of the circuit, and that he should pass on its sufficiency. It did not do this. On the contrary, it provided merely that when the trial judge determined that he should proceed no further, the fact of his disqualification should be certified to the senior circuit judge, whose sole function then was to assign another judge to proceed with the case. But manifestly it was intended that some judge should pass on the sufficiency of the affidavit. Congress has excluded every other judge from the power to do this, and only the judge against whom the affidavit is directed is left to perform that judicial duty. Obviously, then, the only conclusion is that which has been reached by all the courts that have thus far passed on the question, namely, the trial judge must himself pass on the sufficiency of the affidavit before he declines to proceed further with the case. The party filing the affidavit is fully protected by this course. If the trial judge erro-

neously rules that the petition is insufficient, his action is subject to review, and if it is reversed all subsequent proceedings taken by him are wiped out.

IV.

The Facts Stated in the Affidavit in Support of the Belief that Personal Bias or Prejudice Exists Must be Facts Which the Affiant States of His Own Knowledge and Not Merely on Information and Belief.

Assuming that the trial judge must pass upon the sufficiency of the affidavit, the next question is, what shall he consider in arriving at his conclusion? Of course, he must first consider what facts have been averred, and whether they are properly averred. The requirement is that *facts* shall be stated. As seen above, the object in requiring a statement of facts is to get away from basing action upon the mere belief of the affiant. He is required to state *facts* on which he bases his belief. Obviously, it would be insufficient for him to say that he believes prejudice exists because there is a rumor in the community that the judge has done or said such and such thing. This everyone would concede would not be a statement of fact except the bare fact that there is a prevalent rumor, and it is made no more a fact by adding that affiant believes the rumor to be true. A statement that some unnamed person has told him something about the judge's words or conduct would be equally insufficient. Nor would it be made any more suffi-

cient by giving the name of his informant. The only fact which he would then state would be the fact that some third party had made a statement.

It was not contemplated or intended that the act would have very wide application. It could not have been intended that the judge should be disqualified upon a belief on the part of a litigant based upon rumor or mere idle gossip. Since it is only prejudice that is personal to the litigant, and therefore ordinarily grows out of some previous relations, dealings, or contact with the judge, the facts may well be supposed to be within the knowledge of the litigant. This is evidently the view taken of the statute by this court when it said in *Ex parte American Steel Barrel Company, supra:*

> It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. (Id., pp. 43–44.)

Facts " which the affiant is able to state " are, of course, facts which he knows. There is a clear distinction between this and facts which have been reported to him, and the existence of which depend upon the truth or falsity of this secondhand information, and also on whether he may have correctly understood his informant. If any purpose, therefore, is to be served by requiring a

statement of facts, these must be facts which the litigant is able to state as of his own knowledge and not merely as the result of information or rumor communicated to him by others. To say that an affidavit in which the supporting facts are stated merely on information and belief is sufficient would be to do violence both to the language and the intent of Congress.

V.

The Affidavit in This Case is Wholly Insufficient Because the Supporting Facts are Stated Only on Information and Belief.

In this case the only facts and reasons for the belief of prejudice which were presented in the affidavit were certain alleged previous utterances of the judge, which are introduced in the affidavit in this language:

> and in support thereof the defendants allege that, on information and belief, on or about the 1st day of November said Judge Landis said in substance * * *.

This is the form in which a plaintiff in a civil suit may "allege" facts which are not known to him personally, but which he expects to prove when the case comes to trial. Many of the facts upon which a person's civil rights depend are not within his personal knowledge. He has learned of them through others, and he knows witnesses by whose testimony he can prove them. He has the right to make an issue in court in order that he may prove

the facts and have his rights determined. No judgment, however, can be predicated on any fact which he states merely on information and belief unless the fact is admitted by the opposite party or established by competent testimony. We are dealing now, however, with a case in which he is required to state facts, and not merely belief. It is not expected that any issue will be made or witnesses called to prove anything stated in the affidavit. The court is expected to act on the affidavit itself. The act of Congress requires facts—not opinions, beliefs, rumors, or gossip. This court, in the language quoted above, used advisedly the expression facts "which the affiant is able to state." This is not complied with when he merely states that he has heard something; and that is all he states when he alleges a fact on information and belief. No judge is required under this act to hold himself disqualified upon an affidavit which states no fact except on information and belief. The affidavit in this case was, therefore, wholly insufficient for the want of the statement of any facts which the affiant was able to state.

VI.

Even the Facts Stated in the Affidavit on Information and Belief do Not Tend to Show Personal Prejudice.

It should be remembered that the prejudice which disqualifies a judge under this statute is prejudice which is personal to one or the other of the litigants. It is not "prejudice" growing out

of the convictions of the judge with respect to questions involved in the case regardless of who may be the litigants. It is not prejudice based on the judge's intense antipathy and contempt for those who commit the crime with which a defendant may be charged. The judge can not be disqualified upon the ground that he has prejudged the case and given expression to his judgment in previous judicial action, in private conversation, or in public utterances. It must be prejudice which grows out of his knowledge or opinion of the litigant. An affidavit alleging that the judge is an ardent Methodist and entertains an intense prejudice against the Baptist denomination, to which the litigant belongs, would be no ground for disqualification. Equally ineffective would be an affidavit alleging that the judge is a strong Democrat and has previously, in public utterances, indulged in most sweeping denunciation of Republicans, and that the litigant happens to be a Republican. It would hardly be insisted that an affidavit filed by a litigant who is a native-born Irishman that the judge is a native of England and has expressed the strongest prejudice against the Irish people would be sufficient. In all of these cases a prejudice against a large class of people to whom the litigant happens to belong can not be said to be such personal prejudice against the litigant as to disqualify the judge from trying a case to which he is a party.

Certainly, in such cases, unless it is shown that the judge knows the litigant in such a way as that his prejudice against the class extends to the litigant personally, there is no such prejudice as is required by this statute. Again, the fact that a judge believes in severe punishment, and even in a harsh application of the law, to those who commit particular crimes furnishes no reason to believe that he will not fairly try the issue by which it is to be determined whether a defendant is guilty of one of those crimes. It is to be assumed that the very heinousness of the crime will inspire in any intelligent judge the desire that a defendant shall have a fair trial before he shall be convicted.

Undoubtedly, during the active prosecution of the war there was an intense feeling throughout this country against those native-born Germans who, after years of residence in this country, sided with and sought to assist the German Empire as against the United States. That the judges of the country shared this feeling can scarcely be doubted and is to their credit. If this feeling disqualified a judge from trying a case, it would scarcely have been possible to find a United States judge who could preside at the trial of any person of German extraction who was charged with violating the espionage law or other war measure. No intelligent judge, however, would desire that any such person should

be convicted unless guilty. Many judges used very severe language when imposing sentences upon those who had been convicted in such cases. But their condemnation of the crime and of the man who had been convicted of it furnishes no evidence that they had not, in his case, given him a fair trial with the sole desire of ascertaining whether he was guilty, or that they would not be controlled by the same high motives in the trial of similar cases.

In this case it does not appear from the affidavit that the judge knew or had even heard of any one of the defendants. It is not claimed that he had ever expressed any opinion of any of them or of anything they had written, said, or done, or that he had any knowledge of their conduct or knew anything of the case except that they were charged as stated in the indictment. The language which he is quoted as using does not mention or refer to any of them. It quotes him as saying: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." This, if said at all, was said while this country was at war with Germany. It does not refer to German-Americans or native Germans who have become citizens of America; at least there is no express reference to them, and obviously it is an expression applying to the German people and their Government, and the inference to be drawn from the affidavit is that none

of the defendants was a subject of the German Government, but that they were all American citizens, although some were born in Germany and some were of German extraction. This statement, standing alone therefore would not indicate prejudice personal to the defendants within the meaning of the statute. The remaining remarks which the judge was alleged to have made were applied by him to the case of a German who had been convicted in his court. Even as these remarks are quoted in the affidavit the most that can be said of them is that he expressed the belief that German-Americans in this country were not loyal. His condemnation of German-Americans who were not loyal is severe and couched in language somewhat more extravagant than some judges would have used, but expresses, at last, the contempt that all loyal Americans entertained for those American citizens of any nationality who sided with and attempted to assist the enemies of this country.

Throughout all of the remarks as quoted there is nothing said that could apply to any of these defendants, except as some of them may be included in the designation "German-Americans." The remarks do indicate that if these defendants were shown to be guilty of the charges preferred, he would entertain a very great contempt for them and would feel that the law which punished them

severely was right and just. If he had, in fact, expressed the opinion that the German-Americans were disloyal, it indicated, of course, a feeling on his part that the body of this class of citizens was disloyal. No one would infer, however, that he meant that every German-American in this country was disloyal. On the contrary, every intelligent man knew then, and knows now, that many thousands of German-Americans were among the country's most loyal citizens and defenders. His opinion, therefore, of the general class of German-American citizens would, by no means, disqualify him from giving a fair trial to a particular German-American who was being tried in order to determine whether he was in the disloyal class. In other words, no personal contact between the judge and these defendants and no knowledge even of their existence on his part previous to the finding of the indictment having been shown, it can not be said that he had a personal prejudice against any of them merely because they belonged to a general class of people against whom, as a class, but not individually he entertained a prejudice.

It is, therefore, submitted that, taking the affidavit as true, it failed utterly to show any such personal prejudice and bias as the statute requires for the disqualification of a judge.

VII.

Is a Judge Bound Under All Circumstances to Accept as True the Statement of Facts Contained in an Affidavit of Prejudice.

While there is in the record a stenographic report of what Judge Landis said in the remarks which the affidavit purports to quote, this was not filed until after he had overruled the application, apparently upon the ground that it was insufficient. As has been shown above, he was clearly right in this ruling, both because the affidavit stated no facts except on information and belief and because even the facts so stated were wholly insufficient to establish the prejudice alleged. Judge Landis, therefore, did not pass on the question as to whether he was bound to accept as true statements made in the affidavit which he knew were not true. In our view of the case, this court will likewise not find it necessary to pass on that question, and we shall not discuss it at any length. It does seem important, however, to call the court's attention to it, since it seems to be a question of gravity. For this reason, we have referred to the very careful and able opinion of Judge Jones, in which he held that the statute, if construed to automatically remove a judge when the affidavit contains statements which, if true, are sufficient, but which he knows to be untrue, is unconstitutional.

It is a serious thing to say that a judge must practically brand himself in the records of his own court as unworthy and unfit merely because some litigant who, it may be, is utterly unscrupulous has seen fit to file an affidavit falsely charging that he has done and said things which he has not done and said. To say this would put it in the power of every conscienceless litigant to insult and humiliate an honorable and highminded judge at will, and leave that judge powerless to protect himself from the disgrace of a record showing that he is so prejudiced as to be unfit to be a judge. It is easy to conceive of some cases in which it would scarcely be insisted that the judge would have to accept the affidavit as true. For instance, the affiant might charge that on a previous trial the judge had arbitrarily secured his conviction, and that the conviction was so unjust that he had been promptly pardoned by the President, when the record of the judge's own court might show that instead of that being the truth he had, in fact, directed the jury to find a verdict in favor of the affiant, who had therefore not been convicted at all. Certainly, the judge would not be required to shut his eyes to this record of his own court and treat the statements of the affidavit as true.

The present case comes very near to the case supposed. The stenographic report shows clearly that what the judge said was so grossly distorted in the affidavit as to give it an entirely different

meaning. What he said, so far from indicating a prejudice against all Germans, was a denunciation of the occasional disloyal German-American whose conduct unjustly brought reproach upon the entire class to which he belonged. Suppose, again, in a civil case, the affidavit of a defendant should allege that the judge was closely associated in business with the complainant, or was heavily indebted to the plaintiff, who was thereby exerting a dominating influence over him, when the judge knows the fact to be that he has never had any business relations with the plaintiff, owes him no money, and even has no personal acquaintance with him. On such an affidavit can he be required to certify that he is disqualified and rest quietly under this false charge? As stated above, it is not necessary in this case to determine this question. But it has seemed important and proper that it should be mentioned, and a reading of the opinion of Judge Jones, referred to above, will, we think, show that the grounds upon which he held the Act, if so construed, unconstitutional are worthy of the most serious consideration.

VIII.

Answers to the Questions Submitted.

For the reasons stated it is submitted that the answers to the three questions submited should be: To the first question, no; and to the second and third questions, yes.

IX.

Motion of the Plaintiffs in Error to Dismiss or Abate the Prosecution.

The plaintiffs in error have filed a motion to dismiss or abate the prosecution against them. The motion can not be entertained for several reasons:

(1) The case is not here except under the special jurisdiction of this court to answer certain specific questions submitted by the Circuit Court of Appeals, in which the case is now pending. The motion is not based on matters relating in any way to these questions. If there is any ground for dismissing or abating the prosecution, the motion should be presented to the Circuit Court of Appeals and not to this court.

(2) The motion is based upon the mistaken assumption that the espionage law, under which the plaintiffs in error are being prosecuted, is one of the war measures enacted by Congress, which, by their terms, were to expire with the termination of the war with Germany. Starting with this assumption, it is insisted that we are not now at war with Germany and that for this reason the espionage act is no longer in effect. The contention that we are not at war with Germany is based, first, upon the fact that hostilities actually ceased long ago, and, second, that on May 21, 1920, Congress adopted a resolution declaring the war with Germany to be at an end.

It is conceded that this resolution was vetoed by the President, and it has been generally supposed that this prevented its taking effect. The contention is now made that a resolution of this kind does not require the approval of the President, and hence his disapproval did not prevent its taking effect. The theory of the motion is that, either because the war has actually ended or because Congress has by resolution declared it to be ended, the espionage law is no longer in effect, and no saving clause or other legislation having been enacted by Congress, prosecutions begun while the act was in force must now abate.

Even if the case was here in such a way that it would be proper for this court to consider a motion of this kind, it would be necessary to say but little in opposition to the motion. A complete answer is that the espionage act (40 Stat., c. 30, p. 217) is not one of the war measures which, by its own terms, were to expire with the termination of the war which was being waged at the time of its passage. On the contrary, it is enacted as a permanent law of the United States to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States. Section 3, under which plaintiffs in error are indicted, declares that certain things shall be

offenses, not merely while the United States was at war with Germany, but at any time when the United States shall be at war with any country. The other provisions are equally general. None of them are confined to the war which was then being waged. The act contains no clause to the effect that it shall terminate or cease to exist when the war with Germany shall be at an end. It is simply a statute prescribing that certain things shall be offenses when done at any time that the United States may be at war. In other words, it enacts permanent rules which shall govern in times of war. Unless, therefore, the resolution of May 21, 1920, had the effect of repealing this statute, it is still a law of the land and will continue to be, so that if, in any future war, the offenses denounced shall be committed the offenders may be punished. The resolution in question is printed at pages 4–6 of the brief of plaintiffs in error in support of their motion.

It will be seen at a glance that this resolution does not purport to repeal this or any other statute. It simply repeals the resolutions of Congress declaring a state of war to exist between the Imperial German Government and the people of the United States and between the Imperial and Royal Austro-Hungarian Government and the Government and the people of the United States, and declares the war thus begun to be at an end. The only effect it could have on any other previous

legislation would be to determine at what date those measures, which, by their terms, were to be effective only until the termination of the war, ceased to be effective. And there was, in section 2, a general declaration that the date upon which the resolution itself became effective should be deemed the end of the war for purposes of all these measures. As stated above, however, the espionage law was not a measure which was to be effective only during the war but was a permanent statute which should have a governing effect during all periods of war that might occur.

It is therefore wholly unnecessary to discuss the questions which have been so elaborately argued in the brief. There is no contention that the espionage law was not in full force and effect when the offense in question was committed. This contention could not be made because the indictment was found in February, 1918, when the war was flagrant. The law has not been repealed and is still in effect, and it can not be necessary to discuss what would have been the effect upon prosecutions of this kind if the law had been repealed.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

DECEMBER, 1920.

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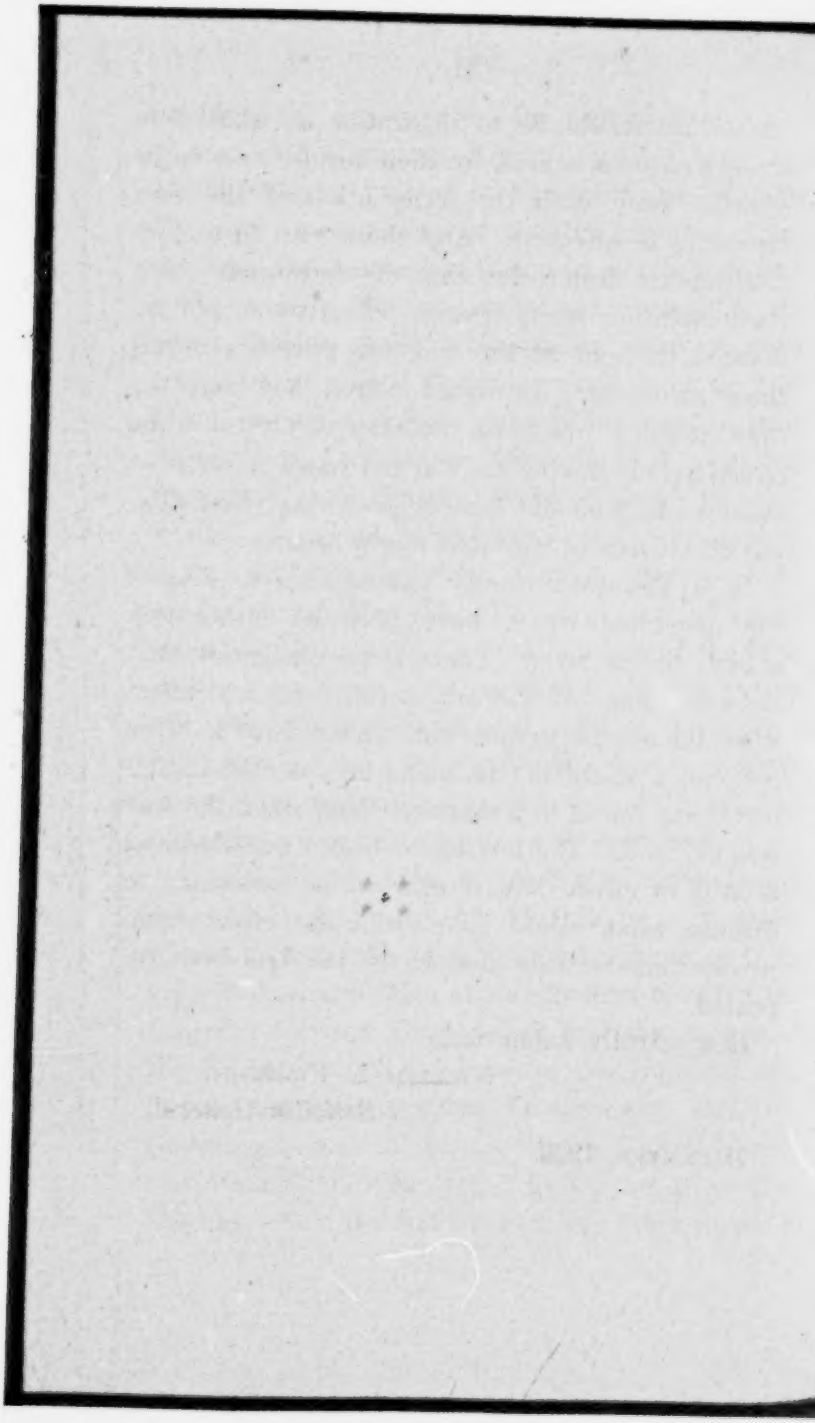

SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1920.

Victor L. Berger, et al., *vs.* The United States of America.	On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[January 31, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

Section 21 of the Judicial Code provides as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, . . . No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

February 2, 1918, there was returned into the District Court of the United States for the Northern District of Illinois, an indictment against plaintiffs in error (it will be convenient to refer to them as defendants), charging them with a violation of the Act of Congress of June 15, 1917, known as the Espionage Act, ch. 30, 40 Stat. 217.* In due time they invoked Section 21 by filing an

*"Whoever when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished. . . ."

affidavit charging Judge Landis, who was to preside at the trial, with personal bias and prejudice against them, and moved for the assignment of another judge to preside at the trial. The motion was denied and upon the trial defendants were convicted and each sentenced to twenty years' imprisonment. From the judgment and sentence they took the case to the United States Circuit Court of Appeals for the Seventh Circuit. That court reciting that certain questions of law under Section 21 have arisen upon the affidavit and motion upon which the court is in doubt and upon which it desires the advice and instructions of this court, certifies questions of the sufficiency of the affidavit and the duty of the judge thereunder, and also certifies the affidavit and other proceedings upon such motion.

The affidavit, omitting formal and unnecessary parts, is as follows: Petitioners (defendants) represent "that they jointly and severally verily believe that His Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause, and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: 'If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.' And referring to a German who was charged with stating that 'Germany had money and plenty of men and wait and see what she is going to do to the United States,' Judge Landis said in substance: 'One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States and have the interests

of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower'.

"These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, National Secretary of the Socialist party; William F. Kruse, editor of the Young Socialists Magazine, a Socialist publication; and J. Louis Engdahl disapproved the entrance of the United States into this war.

"Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries, but verily believe because they are impleaded with Berger, Kruse and Germer that they as well as Berger, Germer and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said Berger, Germer and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case."

The affidavit was accompanied by the certificate of Seymour Stedman, attorney for defendants, that the affidavit and application were made in good faith.

The questions certified are as follows:

(1) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the Act which provides for the filing of affidavit of prejudice of a judge?

(2) Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

(3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

The basis of the questions is Section 21, and the primary question under it is the duty and power of the judge, whether the filing of an affidavit of personal bias or prejudice compels his retirement from the case or whether he can exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them?

These alternatives present the contentions in the case. Defendants contend for the first; the United States contends for the second. The assertion of defendants is that the mandate of the section is not subject to the discretion or judgment of the judge. The assertion of the United States is that the motion and its supporting affidavit, like other motions and their supporting evidence, are submitted for decision and the exercise of the judicial judgment upon them. In other words, the action of the affidavit is not "automatic" to quote the Solicitor General, but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has jurisdiction to pass. The issue is, therefore, precise, and while not in broad compass is practically of first impression as now presented.

In *Glasgow* v. *Moyer*, 225 U. S. 420, the section was referred to but not passed upon. In *Ex parte American Steel Barrel Company*, 230 U. S. 35, the phase of the section presented here was not presented. There proceedings in bankruptcy had progressed to a decree of adjudication, and the judge who had conducted them was charged by certain creditors with bias and prejudice based on his rulings in the case. Such use of Section 21 was disapproved. "It was never intended", it was said, "to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause." As pertinent to the comment and of the meaning of Section 21, we may say, that Judge Chatfield against whom the affidavit was directed, said that he felt that the intention of Section 21 was "to cause a transfer of the case without reference to the merits of the charge of bias", and he did so immediately, in order, as he said, "that the application of the creditors" might "be considered as speedily as possible by such judge as" might "be designated." Another judge was designated and

to restrain action by the latter and vacate the orders that he had made, and to command Judge Chatfield to resume jurisdiction, mandamus was sought. It was denied. The case establishes that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case.

The cases at circuit in which Section 21 was considered have not much guidance. They, however, deserve attention. *Ex Parte N. K. Fairbank Company*, 194 Federal 978, may be considered as expressing power in the presiding judge to pass upon the sufficiency of the facts affirmed. In *Ex parte Glasgow*, 195 Fed. 780, the question came up upon an application for a writ of *habeas corpus* and it appeared that the affidavit of bias was not filed until after trial of the case and when the court was about to pass upon a motion in arrest of judgment and new trial. It was held that Section 21 was not applicable at such stage of the proceedings. *Henry* v. *Speer*, 201 Fed. 869, was a petition for mandamus to require an affidavit of bias against District Judge Speer to be certified to the senior circuit judge that the latter might determine its sufficiency, and to restrain Judge Speer from exercising jurisdiction of the case. The writ was refused on the ground that the affidavit did not conform to Section 21 in that it omitted to charge "personal" bias, a charge of such bias, it was held, being a necessary condition. The court (Circuit Court of Appeals for the Fifth Circuit) by Judge Meek, said, "Upon the making and filing by a party of an affidavit under the provisions of Section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in Section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification." This comment sustains defendants' view of Section 21 and marks a distinction between determining the legal sufficiency of the affidavit and passing upon the truth of its statements, a distinction to which we shall presently advert.

The cases (one being excepted) to the extent they go, militate against the contention of the Government and they have confirmation in the words of the section. Their declaration is that "whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice

either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter." There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.

But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the "affidavit shall state the facts and reasons for the belief" of the existence of the bias or prejudice. It is urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose, that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and less extensive use as pointed out by Judge Meek in *Henry* v. *Speer, supra.* It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits. Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward defendants.

It is, however, said, that the assertion and the facts are stated on information and belief and that hence the affidavit is wholly insufficient, Section 21 requiring facts to be stated "and not merely belief". The contention is that "the court is expected to to act on the affidavit itself" and that, therefore "the Act of Congress requires facts—not opinions, beliefs, rumors or gossip."

Ex parte American Steel Barrel Company, supra, is cited for the contention. We do not know what counsel means by "opinions, beliefs, rumors or gossip". The belief of a party the section makes of concern and if opinion be nearer to or farther from persuasion than belief, both are of influence and universally regarded as of influence in the affairs of men and determinative of their conduct, and it is not strange that Section 21 should so regard them.

We may concede that Section 21 is not fulfilled by the assertion of "rumors or gossip" but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to Section 21 would be arbitrary and make its remedy unavailable in many, if not in most cases. The section permits only the affidavit of a party, and *Ex parte American Steel Barrel Company, supra,* decides, that it must be based upon facts antedating the trial, not those occurring during the trial. In the present case the information was of a definite incident, and its time and place were given. Besides, it cannot be the assumption of Section 21 that the bias or prejudice of a judge in a particular case would be known by everybody, and necessarily, therefore, to deny to a party the use of information received from others is to deny to him at times the benefit of the section.

We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to "proceed no further" in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside, and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of Section 21 has therefore no deterring consequences, and we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit and a charge of, and the penalties of perjury restrain from that—perjury in him who makes the affidavit, connivance therein of counsel thereby sub-

jecting him to disbarment. And upon what inducement and for what achievement—no other than trying the case by one judge rather than another, neither party or counsel having voice or influence in the designation of that other; and the section in its care permits but "one such affidavit."

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate we can only deal with it as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it, but, we may say, that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurence that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated in the manner prescribed in Section 23 to hear such matter". And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

After overruling the motion of plaintiffs for his displacement Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it because under our interpretation of Section 21 it is excluded from consideration.

We come then to the questions certified and to the first we answer Yes, that is that the affidavit of prejudice is sufficient to invoke the operation of the Act. To the second we answer that to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third we answer No, that is, that Judge Landis had no lawful right or power to preside as Judge on the trial of defendants upon the indictment.

So ordered.

SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1920.

Victor L. Berger, et al., vs. The United States of America. } On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[January 31, 1921.]

Mr. Justice Day, dissenting.

As this case is to settle the practice for this and similar cases which may arise in the Federal courts, and as the opinion does not consider some aspects of the record, I venture to state the reasons which impel me to reach a different conclusion than that announced by the majority.

An examination shows that statutes exist in a number of States covering the subject under consideration. These statutes vary in character, and in the requirements for establishing the bias or prejudice of the judge which may require him to abstain from sitting at the trial of a particular case. In some of them an affidavit of belief of prejudice, or that a fair trial cannot be had before a particular Judge, is sufficient to disqualify him. Other statutes require supporting affidavits and the certificate of counsel, and provide for a hearing on the matter of disqualification. In some States the matter is required to be heard before another judge.

The Federal Statute, now under consideration, had its origin in an amendment to the Judicial Code, introduced in the House of Representatives when the adoption of the Code was under consideration. As adopted in the House, the affidavit was required to set forth the reasons for the belief that personal bias or prejudice existed against the party, or in favor of the opposite party to the suit.. (See Congressional Record, Vol. 46, part 3, p. 2626, *et seq.*)

When the bill came before the Senate the section was amended so as to require the facts, and the reasons for the belief that bias or prejudice existed, to be set forth, and the affidavit is required to be accompanied by a certificate of ccunsel of record that it and the application are made in good faith. (Senate Document, No. 848, 61st Congress, 3d Session.) It is thus apparent

that the section in the form in which it finally became part of the Judicial Code intended that the bias or prejudice which should disqualify a judge should be personal against the objecting party, and that it should be established by an affidavit which should set forth the reasons and facts upon which the charge of bias or prejudice was based. The evident purpose of this requirement was to require a showing of such reasons and facts as whould prevent imposition upon the court, and establish the propriety of the affidavit of disqualification. "It is not sufficient", said the late Mr. Justice Brewer, when a member of the Supreme Court of Kansas, in *City of Emporia* v. *Volmer;* 12 Kan. 627, "that a prima facie case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity and of the clearness of his perceptions."

I accept the opinion of the majority that the judge under the requirements of this statute may pass upon the sufficiency of the affidavit, subject to a review of his decision by an appellate court, and if it be sufficient to show personal bias and prejudice, the judge should not try the case. But I am unable to agree that in cases of the character now under consideration the statement of the affidavit, however unfounded, must be accepted by the judge as a sufficient reason for his disqualification, leaving the vindication of the integrity and independence of the judge to the uncertainties and inadequacy of a prosecution for perjury if it should appear that the affidavit contains known misstatements.

Notwithstanding the filing of the affidavit purporting compliance with the statute, the court has a right to use all reasonable means to protect itself from imposition. *Davis et al.* v. *Rivers et al.*, 49 Iowa 435. The personal bias or prejudice of the Judge against the defendants in this case is said to be established by language imputed to the Judge as his utterances concerning the attitude of the German people during the progress of the war.

The affidavit filed contained a statement of alleged language of the Judge, concerning a German who was "charged" with making the statements set forth. Upon receiving the affidavit the Judge at once inquired of counsel whether the language ascribed to him was not in fact uttered in connection with the disposition of the case of United States against one Weisensell in sentencing him after conviction by a jury of a violation of the Espionage Act in the same court. Counsel informed the Judge that such was

the fact. The Judge asked counsel for Berger whether he had made any effort to ascertain the accuracy of the statement alleged to have been made by the court. Counsel replied that he had not. It would seem incredible that any judge could have made such statements concerning a defendant not yet tried in his court, in advance of trial and upon a mere charge of an offense. Counsel in open court admitted that the offending language was used in passing sentence after conviction in Weissensell's case.

Moreover, upon the affidavit being filed, and after this admission of counsel, the District Attorney offered in evidence a transcript of what took place and what was in fact said upon the sentencing of Weissensell. The Judge permitted this stenographic report, sworn to by an experienced stenographer, who made it, to be a true and correct report of the statements made and the proceedings had, to be put into the record, saying that the truth should be shown of record in connection with the falsity, although he was of opinion that the facts stated in the affidavit failed to establish bias or prejudice against the defendants which would disqualify him from sitting at the trial.

This stenographic report, sent up with the certificate and made part of it, and which there is no reason to believe fails to state accurately what took place, is in marked contrast with statements of the affidavit which the defendants made when seeking the disqualification of the Judge. It shows, as we have already stated, that the utterances of the Judge were after conviction of Weissensell, and were made when he was passing sentence. It shows that the statement of the Judge concerning German-Americans was quite different from that stated in the affidavit, and referred to the type of man who had been convicted and was before him for sentence. The Judge in speaking of the convicted defendant said that he was of the type of man who branded almost the whole American-German population, and that one German-American, such as the defendant, talking such stuff did more damage to his people than thousands of them could overcome by being good and loyal citizens; and that he, the defendant, was an illustration of the occasional American of German birth whose conduct had done so much to damn the whole ten million in America. While this language might have been more temperate, there does not appear to be in it anything fairly establishing that the Judge directed his observations at the German people in general, but rather that his remarks were aimed at one convicted as was the defendant, of violation of law.

As I understand the opinion of the court, notwithstanding the admissions of counsel, and the sworn stenographic report of what

took place, the affidavit must be accepted, and if it discloses matters, which if true, would tend to establish bias and prejudice, the same must be given effect and the Judge be disqualified. It does not seem to me that this conclusion comports with the requirements of the statute that reasons and facts must be set forth for the consideration of the judge. It places the Federal courts at the mercy of defendants who are willing to make affidavits as to what took place at previous trials in the court, which the knowledge of the judge, and the uncontradicted testimony of an official report may show to be untrue, and in many districts may greatly retard the trial of criminal causes.

While, as I have said, in sentencing Weissensell the Judge might have been more temperate in his observations, I am unable to find that the statements of the affidavit when read in connection with the admissions of counsel, and the established facts as to what took place as gathered from the stenographic report, showed such evidence of personal bias or prejudice against the defendants as required the Judge upon the mere filing of this affidavit to permit its misleading statements to be placed of record, and to proceed no further with the case.

It does not appear that the trial judge had any acquaintance with any of the defendants, only one of whom was of German birth, or that he had any such bias or prejudice against any of them as would prevent him from fairly and impartially conducting the trial. To permit an *ex parte* affidavit to become in effect a final adjudication of the disqualification of a judge when facts are shown, such as are here established, seems to me to be fraught with much danger to the independent discharge of duties by Federal judges, and to open a door to the abuse of the privilege which is intended to be conferred by the statute in question.

In my judgment the questions propounded, in the light of the disclosures of this record, should be answered as to the first: That the affidavit of prejudice, when read in the light of the other disclosures in the record, was insufficient to meet the requirements of the act. As to the second: That while the Judge might have called upon another judge to pass upon the sufficiency of the affidavit, he had jurisdiction to pass upon it himself if he saw fit to do so. As to the third: That the mere filing of the affidavit did not require the Judge to proceed no further with the trial of the defendants upon the accusation against them.

Mr. Justice PITNEY concurs in this dissent.

SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1920.

Victor L. Berger et al., *vs.* The United States of America. } On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[January 31, 1921.]

Mr. Justice McReynolds, dissenting.

I am unable to follow the reasoning of the opinion approved by the majority or to feel fairly certain of its scope and consequence. If an admitted anarchist charged with murder should affirm an existing prejudice against himself and specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result? Suppose official stenographic notes or other clear evidence should demonstrate the falsity of an affidavit, would it be necessary for the judge to retire? And what should be done if dreams or visions were the basis of an alleged belief?

The conclusion announced gives effect to the statute which seems unwarranted by its terms and beyond the probable intent of Congress. Bias and prejudice are synonymous words and denote "an opinion or leaning adverse to anything without just grounds or before sufficient knowledge"—a state of mind. The statute relates only to adverse opinion or leaning towards an individual and has no application to the appraisement of a class, *e. g.*, revolutionists, assassins, traitors.

To claim personal bias without more is insufficient; "the facts and the reasons for the belief that such bias or prejudice exists" must be set out, and plainly, I think, this must be done in order that the judge or any reviewing tribunal may determine whether they suffice to support honest belief in the disqualifying state of mind.

Defendants' affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Ger-

many, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives who, unhappily, had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be fairly construed as showing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws.

Of course, no judge should preside if he entertains actual personal prejudice towards any party and to this obvious disqualification Congress added honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances. Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. And while "An overspeaking judge is no well tuned cymbal" neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power. It was not the purpose of Congress to empower an unscrupulous defendant seeking escape from merited punishment to remove a judge solely because he had emphatically condemned domestic enemies in time of national danger. The personal concern of the judge in matters of this kind is indeed small, but the concern of the public is very great.

In my view the trial judge committed no error when he considered the affidavit, held it insufficient, and refused to retire.